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IN THE

Supreme Court of the United States

FRATERNAL ORDER OF POLICE, NORTH DAKOTA STATE LODGE; VETERANS OF FOREIGN WARS, DEPARTMENT OF NORTH DAKOTA,
Petitioners,

v.

WAYNE STENEHJEM, in his official capacity as Attorney General of the State of North Dakota,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Eighth Circuit err when it upheld North Dakota's extension of the national do-not-call registry (which expressly exempts all charitable speech and is represented by the FTC to exempt charitable speech) to charitable speech by charities employing professional fundraisers, while exempting other charitable and commercial speech?

CORPORATE DISCLOSURE

Neither Petitioner has any parent company nor does any public company own any stock of either Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on December 7, 2005. The jurisdiction for this Court is evoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case is a facial challenge to the constitutionality of North Dakota Senate Bill 2255, codified at N.D. Cent. Code Chapter 51-28-01 et seq. The Act is included in full in the

Appendix at App. 27a-36a. The United States Constitution First and Fourteenth Amendments provide:

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

And

Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Petitioners' claims are brought pursuant to 42 U.S.C. §§ 1983 and 1988:

Section 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this

section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

And

Section 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.), the Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. 2000cc et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee

as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction. (c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

STATEMENT OF FACTS

1. During the 2003 Legislative Session, the North Dakota Legislature passed Senate Bill 2255, codified at N.D. Cent. Code Chapter 51-28-01 et seq. (the "Act"). The Act prohibits entities defined as "telephone solicitors" from calling North Dakota residents who register with the state's "do-not-call" list. There are several categories of callers and charitable and commercial calls that are exempt from this Act's restrictions.

2. On July 30, 2003, the Fraternal Order of Police and other nonprofit organizations ("the Charities") filed this lawsuit challenging the constitutionality of the Act. The Charities requested that the legislation be declared unconstitutional on its face. Appellee, Fraternal Order of Police, North Dakota State Lodge ("FOP"), is a nonprofit corporation with tax-exempt status under I.R.C. § 501(c)(8). Appellee, Veterans of Foreign Wars-Department of North Dakota ("VFW"), is also a nonprofit corporation with tax-exempt status under I.R.C. § 501(c)(19). The Charities hire compensated professionals to solicit funds for them because they have neither the means nor expertise to raise sufficient funds using employees or volunteers.

3. The Charities are therefore defined as telephone solicitors under the Act, which prevents them from hiring

professional solicitors to call people on the national "do-not-call" registry adopted by North Dakota as the state do-not-call list, although these charitable calls would be legal if placed by compensated employees or volunteers.

4. The Office of the Attorney General is required to establish, maintain, and publish a listing of telephone numbers of North Dakota consumers who request not to receive "telephone solicitations." N.D. Cent. Code § 51-28-09. The Attorney General may satisfy this obligation by contracting to establish the state's own list, or by designating the national do-not-call registry maintained by the Federal Trade Commission as the state do-not-call list. N.D. Cent. Code §51-28-09(2). The Attorney General refers citizens seeking to sign up on the state's do-not-call list to the website for the FTC's national do-not-call registry.

5. "Telephone solicitation" is defined by the Act as: any voice communication over a telephone line for the purpose of encouraging charitable contributions, or the purchase or rental of, or investment in, property, goods, services, or merchandise, including as defined in subsection 3 of section 51-15-03, whether the communication is made by a live operator, through the use of an automatic dialing-announcing device, or by other means. Telephone solicitation does not include communications:

> a. To any subscriber with that subscriber's prior express written request, consent, invitation, or permission.
>
> b. By or on behalf of any person with whom the subscriber has an established personal or business relationship.
>
> c. By or on behalf of a charitable organization that is exempt from federal income taxation under section 501 of the Internal Revenue Code, but only if the following applies:
>
> > (1) The telephone call is made by a volunteer or employee of the charitable organization; and

(2) The person who makes the telephone call immediately discloses the following information upon making contact with the consumer;

(a) The persons true first and last name; and

(b) The name, address, and telephone number of the charitable organization.

d. By or on behalf of any person whose exclusive purpose is to poll or solicit the expression of ideas, opinions, or votes, unless the communication is made through an automatic dialing-announcing device in a manner prohibited by section 51-28-02.

e. By the individual soliciting without the intent to complete, and who does not in fact complete, the sales presentation during the call, but who will complete the sales presentation at a later face-to-face meeting between the individual solicitor or person who makes the initial call and the prospective purchase.

f. By or on behalf of a political party, candidate, or other group with a political purpose, as defined in section 16.1-08.1-01. N.D. Cent. Code § 51-28-01(7).

6. "Established business relationship" is defined by the Act as:

> a relationship between a seller and consumer based on a free trial newspaper subscription or on the consumers purchase, rental, or lease of the sellers goods or services or a financial transaction between the consumer and seller, within the twenty-four months immediately preceding the date of a telemarketing call.

Id. at (4).

7. The Act prohibits certain telephone solicitations as follows:

> A caller may not make or cause to be made any telephone solicitation to the telephone line of any subscriber

> in this state who, for at least thirty-one days before the date the call is made, has been on the do-not-call list established and maintained or used by the attorney general under section 51-28-09 or the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310.

N.D. Cent Code § 51-28-06.

8. The Act may be enforced either by the Attorney General or private persons who receive telephone solicitations allegedly in violation of the Act. N.D. Cent. Code §§ 51-28-11, 13 and 22.

9. The Act provides several means for the Attorney General to enforce its provisions both administratively and judicially.

10. The Act allows the Attorney General to seek relief for alleged violations through the Unlawful Sales and Advertising Practices Act, N.D. Cent. Code § 51-15, as well as the remedies set forth in the Act. N.D. Cent. Code § 51-28-10.

11. The Unlawful Sales and Advertising Practices Act allows the plaintiff to seek injunctive relief from a district court and, in certain circumstances, *ex parte* appointment of a receiver for the assets of alleged violators. N.D. Cent. Code § 51-15-07.

12. The Act allows the Attorney General to issue a cease and desist order "without notice or hearing" and to conduct administrative adjudicative hearings. The Act allows the Attorney General to make findings regarding violations of the Act and assess civil penalties in those administrative hearings. N.D. Cent. Code §§ 51-15-14, 15.

13. The Act can also be enforced by private plaintiffs with no involvement by the Attorney General. Private plaintiffs may bring an action seeking to enjoin violations, or for damages, or for both remedies. The Act provides for actual

damages or $2,000 per violation, whichever is greater. N.D. Cent. Code § 51-28-11. This section does not allocate any special burden of proof on potential plaintiffs.

14. The Act does not require positive proof of identification from any consumer requesting that a number be added or that the consumer requesting a number be added actually be the subscriber to that number. Nor do these procedures require that the number be independently verified as belonging to the person requesting that it be added to the list.

15. The Act does not establish any mechanism to ensure that numbers on the listing are accurate based on citizens moving within the state or out of the state, or a person subscribing for new telephone service and being assigned a number which was previously on the list, nor does it establish means to remove numbers from the list if a person becomes a supporter of a nonprofit organization and wishes to be called in the future to renew that support.

16. The Eighth Circuit reversed the District Court's opinion by judgment entered December 7, 2005. The Charities seek a writ of certiorari from that opinion.

SUMMARY OF ARGUMENT

Petitioners seek review of a decision of the Eighth Circuit Court of Appeals, which conflicts with the decisions of this Court. The Eighth Circuit has ruled that a state may impose do-not-call restrictions on charitable appeals by professional fundraisers while exempting charitable appeals by volunteers and employees. This Court has ruled that charitable appeals delivered by professionals are protected at the core of the First Amendment, and applying restrictions to them "necessarily discriminates" against small, new or unpopular charities that must hire professional fundraiders. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 799 (1988) ("*Riley*").

The Eighth Circuit's decision also conflicts with decisions of the FTC, FCC, and Tenth and Fourth Circuit Courts of Appeals regarding the proper reach of the national do-not-call registry. According to the FTC and Tenth Circuit, the national do-not-call registry promulgated and administered by the FTC does not apply to charitable speech, but only to *core commercial speech*. The FTC has expressly exempted all charitable calls from the do-not-call registry. North Dakota and the Eighth Circuit are attempting to change that. North Dakota has adopted the FTC's national-do-not call registry as a state do-not-call list[1] and, by the provisions of the Act, is unilaterally extending its application to charitable calls made by professional fundraisers.

Thus, North Dakota is now doing what this Court, FTC, FCC, and the Tenth and Fourth Circuit Courts of Appeals suggested cannot be done—subjecting charitable calls to the national do-not-call registry based on whether the charity does or does not hire a professional fundraiser.

The Charities brought a facial challenge under 42 U.S.C. § 1983 in the District Court to the restrictions on charitable calls by professional fundraisers contained in the Act. In *Fraternal Order of Police v. Stenehjem*, 287 F. Supp. 2d 1023, 1031 (D. N.D. 2003) (App. 14a-26a), the District Court properly held the charitable speech restrictions to be facially unconstitutional.

The District Court's decision was reversed by a split panel of the Eighth Circuit Court of Appeals below, reported as *Fraternal Order of Police v. Stenehjem*, 431 F.3d 591 (8th

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[1] See North Dakota State Attorney General's website (www.ag.state.nd.us/nocall/Nocall2.htm), linking individuals seeking to register for North Dakota's state do-not-call restrictions to the website for the national do-not-call registry (www.donotcall.gov). See also N.D. Cent Code § 51-28-06.

Cir. 2005) (App. 1a-13a). The Eighth Circuit's decision subjecting charitable calls to the national do-not-call registry:

> (A)(A) Constitutes a dramatic and dangerous departure from the decisions and pronouncements of the FTC, FCC, and the Tenth and Fourth Circuits regarding the *inapplicability* of the national-do-not call registry to charitable calls (and notably fails to give deference to the pronouncements of the FTC on this point);
>
> (B) Violates the First Amendment principles established by this Court through its application to charitable speech of a lesser standard of review applicable to core commercial calls, and failure to require the government to identify any governmental interest warranting application of do-not-call restrictions to charitable speech;
>
> (C) Violates the First and Fourteenth Amendments by treating some charitable and commercial speech more favorably than the fully-protected speech of the Charities; and
>
> (D) Inexplicably adopts the "FTC's limited jurisdiction" rationale created by the Fourth Circuit in *National Federation of the Blind v. Federal Trade Commission*, 420 F.3d 331 (4th Cir. 2005) (in which the majority held that the application of First Amendment and Equal Protection principles may be defeated through the clever interpretation of agency jurisdictional limitations), despite the fact that the FTC is not a party to this case and the North Dakota Legislature did not rely upon a "limited jurisdiction" argument to justify its discriminatory application of do-not-call restrictions to charities using professional fundraisers.[2]

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[2] A Petition for Writ of Certiorari is pending before this Court (Case No. 05-927), seeking review of the Fourth Circuit's decision in *National Federation of the Blind v. Federal Trade Commission*, 420 F.3d 331 (4th Cir. 2005). In *National Federation of the Blind*, the Fourth Circuit upheld the FTC's regulation of charitable calls by charities employing professional fundraisers.

This Petition should be granted, and the Eighth Circuit's decision should be reversed.

ARGUMENT

A. North Dakota Stands Alone in Attempting to Subject Charitable Calls to Do-Not-Call List Restrictions Applicable to Core Commercial Speech.

Until the Eighth Circuit's decision, charitable calls have been exempt from do-not-call restrictions. The FTC, FCC, and Tenth and Fourth Circuit Courts of Appeals have each considered the application of the national do-not-call restrictions to calls made by or on behalf of charities. Uniformly, they have (1) held that the national do-not-call registry constitutes "content-based" regulation of speech (not "content-neutral"); (2) exempted charitable calls from the national do-not-call registry; and (3) indicated that regulation of charitable calls must be reviewed under the First Amendment applying a *strict scrutiny* standard, not an intermediate scrutiny standard.

North Dakota has attempted to subject charitable calls to blanket do-not-call restrictions, and it is being supported by an erroneous First Amendment analysis by the Eighth Circuit. By subjecting charitable speech to the national do-not-call registry, the Eighth Circuit has violated the First Amendment principles that have exempted charitable calls from the national do-not-call registry, and trammeled on the authority of the FTC and FCC.

The FTC and FCC

The FTC and the FCC promulgated rules creating the national do-not-call registry. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B); and 47 C.F.R. § 64.1200(c)(2). The national do-not-call registry contains the names of individuals who have indicated

that they do not wish to receive unsolicited calls from commercial telemarketers.

Both the FTC and the FCC expressly exempt all charitable telephonic solicitation from their national do-not-call restrictions in deference to the heightened First Amendment protections on charitable speech.

The FTC has exempted all charitable telephonic solicitations (including those by professional fundraisers) from its national do-not-call restrictions, citing to concerns over the more extensive First Amendment rights of charities. *See* 16 C.F.R. § 310.6(a) ("Solicitations to induce charitable contributions via outbound telephone calls are not covered by §310.4(b)(1)(iii)(B) of this Rule [the national do-not-call restrictions].")[3] Deference should be given to the FTC's exemption of charitable calls from the national do-not-call registry. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Mainstream Marketing*, 358 F.3d at 1236 ("courts owe deference to a federal agency's interpretation of a statute it administers").

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[3] *See* Statement of Basis and Purpose, TSR, Final Rule, 68 Fed. Reg. 4580, 4636-4637 (Jan. 29, 2003) ("The Commission approaches with extreme care the issue of tailoring 'do-not-call' requirements narrowly to advance its legitimate interest in privacy protection and yet minimize the impact on the First Amendment rights of charitable organizations and the telemarketers who solicit on their behalf. . . . After careful consideration of the record as a whole and the relevant case law, the Commission has determined that the best approach to achieve narrow tailoring of the 'do-not-call' registry requirements is to exempt from the 'do-not-call' registry requirements solicitations to induce charitable contributions via outbound telephone calls, and instead to bring charitable solicitation telemarketing only within the ambit of the company-specific 'do-not-call' regime contained in the Rule. . . . **This more limited approach does provide some privacy protection in the context of charitable fundraising, and works better to accommodate both the right of privacy and the right of free speech**." (Emphasis added).)

The FCC was directed by Congress to issue rules concerning "the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." *See* Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA"), 47 U.S.C. §227(c)(1). The TCPA expressly exempts calls by tax-exempt nonprofit organizations from its definition of "telephone solicitation." 47 U.S.C. §227(a)(3). The FCC has extended this exemption to all calls made *on behalf of* nonprofit organizations.[4]

The Tenth Circuit Court of Appeals

In *Mainstream Marketing, Inc. v. Federal Communications Commission*, the Tenth Circuit upheld the constitutionality of the national do-not-call registry and regulations because they "**apply only to commercial speech.**" 358 F.3d 1228, 1236 (10th Cir. 2004).[5] The Tenth Circuit held that the national do-not-call restrictions are "content-based restrictions" because they draw a line between commercial and non-commercial speech on the basis of content, and applied the "more lenient" intermediate scrutiny standard of review *only* because of the exemption of charitable calls. *Id.* at 1236-37. Indeed, in order to uphold the constitutionality of the national do-not-call restrictions, the Tenth Circuit read "charitable

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[4] As explained by the FCC: "In light of the record before us, the Commission believes that there has been no change in circumstances that warrant distinguishing those calls made by a professional telemarketer on behalf of a tax-exempt nonprofit organization from those made by the tax-exempt nonprofit itself." 68 Fed. Reg. 44144, 44160 (July 25, 2003).

[5] *See id.* at 1233 ("As we discuss below in greater detail, four key aspects of the do-not-call registry convince us that it is consistent with First Amendment requirements. **First, the list restricts *only core commercial speech*.** . . ." [emphasis added]); *id.* at 1234 n.6 ("[W]e use the term 'telemarketing' to refer to commercial sales calls made to induce purchases of goods or services (**not charitable** or political fundraising), consistent with Congress' definition in the Telemarketing Act." [emphasis added])

solicitation" out of the definition of "telemarketing." *Id.* at 1234 n.6.

The Fourth Circuit Court of Appeals

In *National Federation of the Blind v. Federal Trade Commission*, the Fourth Circuit confirmed that "[t]elefunders are not, however, subject to the more restrictive national 'do not call list' which forbids calls to people who have put their names on a general nationwide opt-out registry." 420 F.3d 331, 342 (4th Cir. 2005) (emphasis added). The Fourth Circuit upheld the FTC's requirement that charities comply with a charity-specific do-not-call list, *i.e.*, refrain from calling persons who have previously asked not to be called by a specific charity, on the ground that a charity-specific do-not-call list is more "narrowly tailored" than the restrictions associated with the national do-not call registry. *Id.* at 336, 342 ("In light of the [more restrictive national do-not-call registry], we have no trouble finding the charity-specific restriction on speech to be a permissibly narrow means of protecting the home environment.").

Thus, the FTC, FCC, and Tenth and Fourth Circuit Courts of Appeals have all confirmed the exemption of charitable calls from the national do-not-call registry and restrictions. The Eighth Circuit's departure is unwarranted and unconstitutional.

B. The Eighth Circuit's "Lesser Scrutiny" of the Act's Do-Not-Call Restrictions Violates Fundamental First Amendment Principles.

1. The Eighth Circuit Improperly Applied to Charitable Calls the "More Lenient" Intermediate Scrutiny Standard of Review Applicable to Core Commercial Speech.

The FTC, FCC, Tenth Circuit and Fourth Circuit all agree that, while an intermediate standard of review might be appropriate for the application of the national do-not-call

restrictions to core commercial speech, a higher level of review must be applied to charitable speech. *See* 68 Fed. Reg. 4580, 4636-4637 (FTC); 68 Fed. Reg. 44144, 44160 (FCC); *Mainstream Marketing*, 358 F.3d at 1236-37 (Tenth Circuit); *National Federation of the Blind*, 420 F.3d 342 (Fourth Circuit).

This is due to the higher protection generally afforded charitable speech than commercial speech. "[C]ommercial speech" has been defined as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). Charitable solicitations "have not been dealt with as purely commercial speech." *Riley*, 487 U.S. at 787-88; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (noting that the Court has "consistently accorded noncommercial speech a greater degree of protection than commercial speech").

This Court established the First Amendment principles governing regulation of charitable speech in three cases often described as the "Riley trilogy"— *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980) ("*Schaumburg*"), *Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) ("*Munson*") and *Riley*. Under the Riley trilogy, regulation of charitable speech is subject to strict scrutiny. *See, e.g., McConnell v. Fed'l Election Comm'n*, 540 U.S. 93, 140 (2003) (noting that the Court in *Riley* applied "strict scrutiny" to the charitable solicitation regulation at issue). "Charitable speech" is broadly construed to encompass commercial speech aspects of a charitable solicitation. *See Riley*, 487 U.S. at 795-96; *Gordon and Breach Science Publishers v. Am. Inst. of Physics*, 859 F.Supp. 1521, 1541 (S.D.N.Y. 1994). A regulation may not impose a direct and substantial limitation on charitable speech unless it serves a sufficiently strong subordinating interest that the state is entitled to protect and the state has done so by narrowly drawn

regulations designed to serve those interests without interfering with First Amendment freedoms. *Schaumburg*, 444 U.S. at 636-37.

Riley specifically ruled that applying restrictions to the speech of charities delivered through fundraisers, but not to speech made by employees or volunteers of charities, ". . . necessarily discriminates against small or unpopular charities, which must usually rely on professional fundraisers." 487 U.S. at 799.

The District Court below correctly applied strict scrutiny to the charitable restrictions contained in the Act, in recognition of the higher protection afforded charitable speech, and the content-based nature of do-not-call restrictions. *See Fraternal Order of Police*, 287 F. Supp. 2d at 1030 (App. 24a) ("In order for North Dakota's restriction on charitable speech to be upheld, it must withstand strict scrutiny."); *id.* at 1030 (App. 23a) ("North Dakota's law does not leave it to the recipient's sole discretion who may not call them, so it is not content-neutral."); and *id.* (App. 24a) ("North Dakota's law does not apply uniformly to commercial speech, and it also distinguishes between charitable and commercial solicitations, which make North Dakota's law content-based.").

Over a well-reasoned dissent, an Eighth Circuit panel majority disagreed with the District Court on these points and, through a baffling and cursory First Amendment analysis, reversed the District Court and upheld the constitutionality of the Act. The Eighth Circuit's decision cannot stand.

First, after conceding that the application of the do-not-call registry turned on an analysis of the *content* of speech, the Eighth Circuit majority held that the registry was "content neutral" because (a) in its opinion, the Court did not believe that the North Dakota Legislature had "any disagreement with the message that would be conveyed" by professional solicitors, as opposed to volunteers (431 F.3d at 596 [App. 3a]);

and (b) again in its opinion, applying the restrictions to charitable solicitation, but not advocacy, was reasonable "because solicitation may reasonably be viewed as more invasive than advocacy." (*Id.* at 597 [App. 3a].) The value judgments expressed in the Eighth Circuit's analysis and its reference to the content of the subject speech proves the content-based nature of the regulations at issue. *See Ward v. Rock Against Racism*, 491 U.S. 871, 891 (1989) (cited by the Eight Circuit), stating: "Regulation of expressive activity is content neutral if it is justified *without reference* to the content of regulated speech."

The Act's exemption of charities placing calls "in house" also shows the content-based nature of the Act as it requires a immediate forced speech disclosure for the exemption to apply. N.D. Cent. Code § 51-28-01(7)(c), App. 28a. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." *Riley*, 487 U.S. at 795.

Second, the Eighth Circuit applied an "intermediate scrutiny" standard of review to the application of the do-not-call restrictions to charitable speech. In addition to violating the First Amendment principles articulated in the *Riley* trilogy, the application of intermediate scrutiny contravenes relevant pronouncements by the FTC and Tenth Circuit. As discussed above, the Tenth Circuit applied intermediate scrutiny to uphold the national do-not-call registry *only* after determining that charitable solicitation was *exempt* from the registry. *Mainstream Marketing*, 358 F.3d at 1236-37. The FTC has attributed its reluctance to apply the national do-not-call registry to charitable speech to the higher value level of First Amendment protection accorded charitable speech. 68 Fed. Reg. 4580, 4636-37. The Eighth Circuit's application of the "intermediate scrutiny" standard of review was unprecedented and improper.

2. The Majority Below Failed to Require North Dakota To Meet Its Burden of Justifying Regulation of Charitable Speech.

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816-17 (2000) (citing cases).

The District Court below correctly struck the restrictions of the Act as applied to charitable solicitation because North Dakota failed to show that the law "target[s] and eliminate[s] 'no more than the exact source of the evil it seeks to remedy.'" 287 F. Supp. 2d at 1029 (App. 21a). As lamented by the Eighth Circuit's dissenting opinion, "[t]he state has provided no statistics to support its assertion that its restriction on telefunders' charitable solicitations will significantly reduce the number of telephone intrusions into private residences." 431 F.3d at 601 (App. 12a) (dissenting opinion).

In reversing the District Court, the Eighth Circuit majority ignored the dearth of evidence, instead relying on the North Dakota Legislature's "judgment." As explained by the Eighth Circuit, "we are reluctant to second-guess the North Dakota Legislature's judgment that professional solicitors intrude more regularly on residents' privacy than volunteers or employees and that the Act is a necessary means of enabling its citizens to halt these intrusions." 431 F.3d at 598 (App. 5a).

But this Court has never allowed the regulation of fully-protected charitable speech based upon the mere "judgment" of the government. *See Bartnicki v. Vopper*, 532 U.S. 514, 532 n.18 (2001) (noting that even the burden of justifying restrictions on less-protected commercial speech requires more than "'mere speculation or conjecture'") (quoting *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 188 (1999); *Playboy Entm't*, 529 U.S. at 819 (hold-

ing that the government failed to carry its burden where it offered "anecdotal evidence" but "little hard evidence" and "no proof" justifying its speech regulation); *cf. Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 624-25 (1998) (Scalia, J., concurring) (emphasizing that the First Amendment would even prohibit a government fraud action against a professional fundraiser, but for the substantial record evidence of specific fraudulent misrepresentations). *See also Mainstream Marketing*, 358 F.3d at 1233 (relying on the FTC's evidence of the harassing effects of the commercial speech at issue, and the absence of comparable evidence for charitable solicitations, to uphold the application of the national do-not-call registry to commercial callers only).

This Court has also ruled that the professional status of the speaker does not change the fully-protected nature of that speech. *Riley*, 487 U.S. at 801; *Meyer v. Grant*, 486 U.S. 414, 437 n.7 (1988).

In this case, North Dakota not only failed to present evidence supporting its particular choice of regulation (*i.e.*, subjecting charitable calls by professional fundraisers to do-not-call restrictions applicable to commercial speech), it also failed to present evidence of any problem to be remedied. Indeed, according to the Tenth Circuit and the FTC, the telemarketing problem was solved with the application of the national do-not-call registry to commercial calls. *See Mainstream Marketing*, 358 F.3d at 1233 ("The government also had evidence that the less restrictive company-specific do-not-call list did not solve the problems caused by commercial telemarketing, but had no comparable evidence with respect to charitable and political fundraising.")[6]

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[6] This finding was based upon the FTC's briefing, in which the FTC *conceded* its lack of evidence supporting regulation of charitable calls. *See* FTC's *Mainstream Marketing* Brief, pages 49-50 ("[T]he FTC had substantial evidence that the company-specific approach was insufficient

The Eighth Circuit majority gave short shrift to the mammoth burden facing the North Dakota Legislature to justify its restrictions on charitable calls. In *Schaumburg v. Citizens for Better Environment*, 444 U.S. at 638-39, this Court held that neither the governmental interest in protecting citizens from fraudulent solicitations nor from invasion of the privacy of the home warranted banning charitable solicitations by professional fundraisers. As explained by this Court in *Schaumburg*:

> The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. . . ." Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than deciding in advance what information may be disseminated from house to house, and who may impart that information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

Id.; see also WRG Enterprises, Inc. v. Crowell, 758 S.W.2d 214 (Tenn. 1988) ("there has been no showing that this appellant has engaged in fraudulent practices. . . . 'Mere speculation does not constitute a compelling state interest.' . . . Prohibition of telephone solicitations is not the least restrictive means available to the State in seeking to prevent its citizens from fraud."); *Optimist Club of North Raleigh, North Carolina v. Riley*, 563 F.Supp. 847 (E.D.N.C. 1982)

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to control unwanted commercial telemarketing, **but had amassed no similar evidence regarding charitable telemarketing**. 68 Fed. Reg. at 4629. Moreover, the rulemaking record supports the conclusion that, in light of 'fundamental differences between commercial solicitations and charitable solicitations,' the company-specific approach is more likely to be successful in the charitable context."); and *id.*, p. 38 ("[T]he government has no evidence that charities will flout the company-specific provision. . . .")

(holding that a statute making it a misdemeanor for a professional solicitor to solicit by telephone for charitable contributions violated the First and Fourteenth Amendments, and that "there are less restrictive means available to the state [to protect its citizens from fraud]."); and *Planned Parenthood League of Massachusetts, Inc. v. Attorney General*, 391 Mass. 709, 713 (Mass. 1984) (holding a ban on telephonic charitable solicitation to be facially unconstitutional under the First Amendment, and not overridden by any the state's interest in residential privacy).

The North Dakota Legislature has prohibited the Charities (and other small charities using professional fundraisers) from making charitable calls to individuals on the national do-not-call list *without a shred of evidence* that (a) charitable calls pose a threat of fraudulent practices or invasion of residential privacy; or (b) application of do-not-call restrictions are necessary to address any such threat.

At the end of the day, North Dakota's prohibition against charitable calls by professional fundraisers rests upon nothing more than its attorney's unsubstantiated *argument* that "a charity using paid professional telemarketers is typically able to dial substantially more residential telephone numbers than if the charity used its own volunteers or employees." 431 F.3d at 598 (App. 5a.) The Act admittedly is exactly the type of economic restriction on charitable fundraising activity held to be facially unconstitutional in *Munson*, 467 U.S. at 968.

3. The Eighth Circuit's Erroneous Fourth Circuit Citation Led It to Uphold an Under-Inclusive Speech Restriction that Discriminates Against Smaller, Less-Popular Charities.

The Eighth Circuit's decision cites to and relies upon the Fourth Circuit's recent split decision in *National Federation of the Blind*, 420 F.3d 342. The decision in *National Federation of the Blind* upheld the FTC's discriminatory application of charitable call restrictions (*not* including a do-not-call

registry) on charities employing professional fundraisers, on the ground that the FTC has jurisdiction over professional fundraisers, but not over charities themselves. According to the Fourth Circuit decision, the government may avoid the constitutional promises of Free Speech and Equal Protection simply by cleverly interpreting or crafting agency jurisdictional restrictions to permit regulation of only one of two similarly situated speakers. A Petition for Writ of Certiorari in *National Federation of the Blind v. FTC* is pending before this Court (Case No. 05-927).

The FTC's "limited jurisdiction" argument sanctioned by the Fourth Circuit in *National Federation of the Blind* was wrong in that case—and has no conceivable application in this case. The FTC is not a party to this case, and the North Dakota Legislature did not raise any jurisdictional limitations to justify its discriminatory treat-ment of charities that use professional fundraisers. Nonetheless, the Eighth Circuit relied upon the FTC's "limited jurisdiction" as justification for the North Dakota Legislature's discriminatory treatment of smaller, less popular charities that must employ professional fundraisers. In so doing, the Eighth Circuit summarily discarded the First Amendment requirement of a neutral justification for North Dakota's speaker-based distinctions in the regulation of protected speech, and the concomitant evidentiary burden of the Government to defend speech restrictions. This Court should grant certiorari to reinstate these black letter standards in the Eighth Circuit.

Government regulation of protected speech ordinarily must be evenhanded and not dependent on the identity or resources of the speaker. *See, e.g., Greater New Orleans Broadcasting Assn.*, 527 U.S. at 190 (hold-ing that the government cannot restrict advertising for private casinos while allowing the advertising for tribal casinos); *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989) (holding that a ban on truthful speech to safeguard privacy interests must apply "evenhandedly, to the smalltime disseminator as well as the media giant"); *Police*

Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972) ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression.").

But the Nor.h Dakota regulations at issue below are not evenhanded. They apply differentially among similarly situated speakers (people speaking in support of charities), using the same medium of expression (the telephone) to deliver comparable speech (charitable appeals and education). This Court has long recognized that the selective speech regulation of professional charitable fundraisers "necessarily discriminates against small or unpopular charities," since it is this subcategory of charities that "must usually rely on professional fundraisers." *Riley*, 487 U.S. at 799. Such discrimination in restricting charitable speech based on the identity and resources of the speakers—favoring larger, more self-sufficient charities over smaller, less prominent ones—violates basic First Amendment principles.[7] Supreme Court authority requires the government to justify, substantively and in a speech-neutral way, such suspect distinctions in the regulation of speakers and messages. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (striking city's "selective and categorical" ban on newsracks dispensing commercial handbills because city failed to make a

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[7] Equivalently, the North Dakota law thus also violates the Equal Protection clause of the Fourteenth Amendment by discriminating among similarly situated speakers delivering comparable protected charitable speech over the same medium of expression. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 n.3 (1987) ("Appellant's First Amendment claims are obviously intertwined with interests arising under the Equal Protection Clause."); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (Stewart, J., concurring) (noting that the Court's analysis of an anti-picketing statute on Equal Protection grounds actually implicated "the basic meaning of the constitutional protection of free speech"); and *Special Programs, Inc. v. Courter*, 923 F.Supp. 851 (E.D. Va. 1996) (holding that strict scrutiny applied to the equal protection claims made by a professional fundraiser challenging a regulation exempting other charitable speakers).

coherent showing on the record to support its comparative tolerance of newspaper newsracks); *Carey v. Brown*, 447 U.S. at 465 (holding that an anti-picketing statute could not be upheld as a means of protecting residential privacy because its exclusion for labor picketing had no apparent bearing on privacy, since such excluded picketing was not inherently less disruptive of privacy).

The Act further treats some commercial speech (e.g. by persons with an established business relationship) more favorably than the charitable speech of the Charities through their professional fundraisers. This violates this Court's directives in *Metromedia.*, 453 U.S. at 513; *see also Clear Channel Outdoor, Inc. v. City of St. Paul*, No. 02-1060, 2003 U.S. Dist. LEXIS 13751, at *14-15 (D. Minn. Aug. 4, 2003).

The Eighth Circuit silently side-stepped each of the foregoing constitutional concerns and dispensed with any requirement that the government justify its speaker-based, discriminatory speech distinctions in any way. Instead of any analysis to support this departure, the majority below simply cited and "join[ed] in" the Fourth Circuit majority in *National Federation of the Blind*, purporting to find its "analysis persuasive"—without acknowledging that the Fourth Circuit opinion embraced the FTC's "limited jurisdiction" as a proxy for a substantive neutral justification by the government. *Fraternal Order of Police*, 431 F.3d at 598 (App. at 6a). *See National Federation of the Blind*, 420 F.3d at 438 (finding that the FTC's "jurisdictional boundary" served as the "neutral justification" for a milder distinction between professional and volunteer charitable solicitation). Of course, the Fourth Cir-cuit's reliance on "FTC jurisdiction" to displace the government's First Amendment burden of justifying its discrimination among speakers has *logically nothing whatsoever* to do with the laws of North Dakota or any purported justification for them, or for abandoning long-standing First Amendment principles. Nonetheless, the majority below incongruously cites *National Federation of*

the Blind as sole support for the implausibly generic proposition that "the distinction between professional charitable solicitors and in-house charitable solicitors" is "permissible," 431 F.3d at 598—without reference to context, evidence, neutral justification, burden, or proof. This was clear error reflecting a wholesale abandonment of traditional Constitutional standards.

Having passed the point of no return, the majority below compounded the error. To reconcile (in the absence of any substantive government defense) the obvious underinclusiveness of North Dakota's speech regulation exemption for larger charities with in-house outreach resources, the majority below—unfettered by the traditional requirement of neutral justification—recited the proposition that such a distinction survives if it "does not give one side of a debate an advantage over the other," and it reduces the number of charitable solicitations (albeit on a blatantly discriminatory basis). 431 F.3d at 598. But this Court has "expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 47, n.3 (1999) (Stevens, J., dissenting) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Discovery Network*, 507 U.S. at 529. Moreover, even under the rejected standard, the competition among non-profits for shares of a finite pool of donative dollars *is* a form of debate about the relative merits of different charitable causes, so that selectively impeding the ability of some charities to communicate on the merits *does* give "one side of a debate an advantage over the other."

When the majority below summarily absolved North Dakota of its burden to demonstrate a neutral justification for its speaker-based distinctions, it necessarily also rejected this Court's requirement that, "[w]hen the Government restricts speech, the Government bears the burden of proving the

constitutionality of its actions." *Playboy Entertainment*, 529 U.S. at 816-17 (citing cases). As discussed above, but bears repeating, to carry this burden requires evidence. *Id.* at 819; *Bartnicki*, 532 U.S. at 532 n.18; *Madigan*, 538 U.S. at 624-25 (Scalia, J., concurring). *See also Mainstream Marketing*, 358 F.3d at 1233. But the majority below simply and expressly deferred to North Dakota's bald assertion that "professional charitable solicitors intrude more regularly on residents' privacy than volunteers or employees." 431 F.3d at 598.[8] As observed by the dissenting judge, *nothing in the record* provided any basis for such a conclusion. *Id.* at 601 n.4 (Heaney, J., dissenting) (App. 12a).

Contrary to the majority decision below, this Court's cases are clear that discriminatory underinclusiveness in speech regulation predicated on the identity or resources of the speaker violates the First Amendment, absent convincing evidence of a neutral justification for doing so. Tracing to its inapt citation to a Fourth Circuit split decision pertaining to FTC jurisdiction, the Eighth Circuit has abandoned this Court's longstanding requirement that the government meet an evidentiary burden of supporting a neutral justification for bald discrimination in the regulation of protected speech. The Court should grant certiorari to correct these departures.

4. The Eighth Circuit's Erroneous Fourth Circuit Citation Also Led It to Uphold an Over-Inclusive First Amendment Infringement of Charitable Speech.

The Eighth Circuit majority concluded that government may discriminate arbitrarily against smaller charities and telefunders, and further concluded that government may thereby

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[8] Notably, it was immediately following this gesture of uncritical deference to local government that the majority opinion inaptly declared its reliance on *National Federation of the Blind* to support generically the speaker-based discrimination for which the government had offered no specific evidence.

treat commercial and small-charity speakers as a single category of disfavored speech covered by a do-not-call list. This further leap disregarded entirely the longstanding First Amendment distinction between charitable and core commercial speech, by lumping in with North Dakota's ban on commercial sales calls the purely charitable solicitations made on behalf of non-profit charities. This plainly contravenes the law of this Court. *See, e.g., Riley*, 487 U.S. at 796; *Metromedia*, 453 U.S. at 513 (noting that the Court has "consistently accorded noncommercial speech a greater degree of protection than commercial speech" and this could not treat commercial speech more favorably than fully protected speech). It also denies the basis for the FTC's correct observation that regulation of charitable education and fundraising must be tailored more carefully than that of less-protected commercial speech, so as to "minimize the impact on the First Amendment rights of charitable organizations and the telemarketers who solicit on their behalf," and requires the exemption of all charitable solicitation from commercial do-not-call regulations. 68 Fed. Reg. 4580, 4636-37 (Jan. 29, 2003). *See also Mainstream Marketing*, 358 F.3d at 1233, 1236 (upholding national do-not-call list restriction on core commercial speech by noting that all charitable solicitations are clearly exempt from the restriction).

Whatever its treatment of pure commercial speech, the government has no legitimate interest—much less a compelling one—in blocking protected charitable speech from reaching willing recipients. As the dissent noted below, the very act of co-mingling regulation of fully-protected charitable speech with less-protected commercial speech through a single, take-it-or-leave-it do-not-call list forces people who specifically want to avoid commercial telephone calls to sign up for a ban that necessarily comprises purely charitable communications as well. *Fraternal Order of Police*, 431 F.3d at 601 (Heaney, J., dissenting) (App. at 11a). This renders the North Dakota statute overinclusive in addition to underinclu-

sive—sweeping "too broadly" and "penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). The problem is even worse for the North Dakota residents who signed up for the FTC's national do-not-call list, thinking (correctly) that charities were exempt; they would not even have understood the nature of the take-it-or-leave-it choice their state government would force.

Indeed, as observed also by the District Court below, under North Dakota's statutory scheme, it is the government—not the speech recipient—that decides which protected communications the do-not-call list bans. 287 F. Supp. 2d at 1030 (App. 23a). "But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). Accordingly, this Court recognizes as over-inclusive such local laws that vest choice in government decision makers to determine which speech is banned or impeded. *Forsyth*, 505 U.S. at 129-30.

Such overbreadth is even more troubling when a state (like North Dakota) adopts the national do-not-call registry—which expressly exempts all charitable speech and is represented by the FTC to exempt charitable speech—and then extends its application to charitable speech without notice to registrants.

By lumping fully protected charity speech with less protected commercial speech on a single do-not-call list, North Dakota has departed from and diluted the First Amendment protections surrounding charitable appeals. Indeed, the North Dakota scheme is not tailored to avoid over-inclusiveness with respect to charitable speech at all; this is immediately illustrated by the fact that the comprehensive telemarketing regulations administered by the FTC and FCC specifically avoid mixing charitable solicitors with commercial callers on the same do-not-call list. On the federal level, this was not

even a close call—and even if it were, "the tie goes to free expression." *Playboy Entertainment*, 529 U.S. at 819.

CONCLUSION

Because the decision below conflicts with the rulings of this Court, other appeals courts and the United States Constitution, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3848, No. 04-1619, No. 04-1620

FRATERNAL ORDER OF POLICE, NORTH DAKOTA STATE LODGE; VETERANS OF FOREIGN WARS, DEPARTMENT OF NORTH DAKOTA,
Appellees,

vs.

WAYNE STENEHJEM, in his official capacity as Attorney General of the State of North Dakota,
Appellant.

November 19, 2004, Submitted
December 7, 2005, Filed

Before WOLLMAN and HEANEY, *Circuit Judges*, and HOLMES,[1] *District Judge*.

WOLLMAN, *Circuit Judge*.

I.

This case involves a facial challenge to North Dakota Century Code Chapter 51-28 (the "Act"), which prohibits certain telephone solicitations of North Dakota residents who register with the state's "do-not-call" list. Plaintiffs are non-profit organizations who rely on professional charitable solicitors for their fundraising.

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[1] The Honorable J. Leon Holmes, United States District Judge for the Eastern District of Arkansas, sitting by designation.

The Act exempts telephone solicitations made by charitable organizations if "the telephone call is made by a volunteer or employee of the charitable organization" and the caller makes specified disclosures. N.D. Cent. Code § 51-28-01(7) (2003).[2] The Act thus distinguishes between "in-house" charitable solicitors and professional charitable solicitors. Further, the Act's restrictions apply only to telephone solicitation. See *id.* Under the Act, a charity may hire an outside agency to call registrants to advocate the charity's message, but that agency may not solicit the registrant to donate funds.

The district court invalidated a portion of the Act as a content-based regulation that failed strict scrutiny. The district court also awarded attorney's fees under 42 U.S.C. § 1988. North Dakota appeals from the invalidation of the Act, and the parties cross-appeal the award of attorney's fees. We reverse.

II.

We review *de novo* the district court's grant of judgment on the pleadings as to the unconstitutionality of the Act. *Potthoff v. Morin*, 245 F.3d 710, 715 (8th Cir. 2001). Because professional charitable solicitation is fully protected speech, see *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988), we begin our analysis by determining whether the North Dakota regulation is content neutral or content based.

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[2] The Act also exempts calls made with a resident's prior written consent; by or on behalf of any person with whom the resident has an established personal or business relationship; by or on behalf of pollsters unless the call is made through an automatic dialing-announcing service; by individuals soliciting without the intent to complete the solicitation on the phone but who will follow up with a face-to-face meeting; and by or on behalf of a political party, candidate, or other group with a political purpose. *Id.*

The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message the speech conveys. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Regulation of expressive activity is content neutral if it is justified without reference to the content of the regulated speech. *Id.*

Applying these principles to North Dakota's statute, it is evident that the Act is content neutral. First, North Dakota has not distinguished between professional and in-house charitable solicitors because of any disagreement with the message that would be conveyed, for the message would be identical regardless of who conveyed it. Second, the regulation can be justified without reference to the content of the regulated speech, for North Dakota's interest is in protecting residential privacy.

Although the Act appears to make a subject matter distinction between advocacy and solicitation, a regulation that distinguishes between speech activities likely to produce the consequences that it seeks to prevent and speech activities unlikely to have to those consequences "cannot be struck down for failure to maintain 'content neutrality.'" *Hill v. Colorado*, 530 U.S. 703, 724, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). As the Tenth Circuit observed in reviewing the commercial solicitation restrictions of the national do-not-call registry, the interest in residential privacy "is not limited to the ringing of the phone; rather, how invasive a phone call may be is also influenced by the manner and substance of the call." *F.T.C. v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 855 (10th Cir. 2003) (per curiam). Because solicitation may reasonably be viewed as more invasive than advocacy, we conclude that the Act is a content-neutral regulation. See

United States v. Kokinda, 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990) (plurality of the Court upholding Postal Service regulation distinguishing between solicitation and advocacy); *Nat'l Fed'n of the Blind of Arkansas, Inc. v. Pryor*, 258 F.3d 851, 855 n.3 (8th Cir. 2001). (rejecting the charity's argument that the regulation was content based because it regulated only speech that solicits charitable contribution or commercial sales).

III.

The test appropriate for regulation of professional charitable solicitation is derived from *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). Although the Supreme Court has not specified whether the Schaumburg test is an intermediate scrutiny review of a content-neutral regulation, we have interpreted it as such. See *Pryor*, 258 F.3d at 854.

We observed in Pryor that the Schaumburg test is "obviously very similar" to the time, place, and manner test enunciated in *Ward*. *Id.* at 855. We then considered: (a) whether the State had a sufficient or "legitimate" interest; (b) whether the interest identified was "significantly furthered" by a narrowly tailored regulation; and (c) whether the regulation substantially limited charitable solicitations. *Id.* at 855-56.

A.

The first question under Pryor is whether the State has a sufficient or legitimate interest. We have held that residential privacy is a "significant" government interest, particularly when telemarketing calls "are flourishing, and becoming a recurring nuisance by virtue of their quantity." *Van Bergen v. Minnesota*, 59 F.3d 1541, 1555 (8th Cir. 1995). *See also Frisby v. Schultz*, 487 U.S. 474, 484, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."). The

rationale underlying the North Dakota regulation falls within this significant interest.

B.

We next consider whether North Dakota's regulation is narrowly tailored. "The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial interest that would be achieved less effectively absent the regulation and the means chosen does not burden substantially more speech than is necessary to further the [state's] content-neutral interest." *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1219 (8th Cir. 1998) (citations omitted); *Ward*, 491 U.S. at 799. When a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal. *Hill*, 530 U.S. at 726.

North Dakota's goal of ensuring residential privacy would be achieved less effectively if the legislature exempted professional charitable solicitors from the Act. Seeking to balance the interest of callers against the privacy rights of subscribers, the legislature distinguished between in-house and professional charitable solicitors. North Dakota contends that the distinction is based upon the sheer volume of calls because "[a] charity using paid professional telemarketers is typically able to dial substantially more residential telephone numbers than if the charity used its own volunteers and employees." Appellant's Brief at 11. In this facial challenge, we are reluctant to second-guess the North Dakota Legislature's judgment that professional charitable solicitors intrude more regularly on residents' privacy than volunteers or employees and that the Act is a necessary means of enabling its citizens to halt these intrusions. See *Pryor*, 258 F.3d at 856 (giving deference to the state in a facial challenge to the state's telephone solicitation regulations).

The Fourth Circuit recently upheld the Federal Trade Commission's (FTC's) charity-specific do-not-call provision. *Nat'l Fed'n of the Blind v. F.T.C.*, 420 F.3d 331, 341 (4th Cir. 2005). Like the statute at issue here, the FTC regulation applied to professional charitable solicitors and exempted in-house or volunteer solicitors. The court held that the regulations struck an appropriate balance between "the rights of charities and telefunders to communicate with potential donors" and "the right of those donors to enjoy residential peace." *Id.* at 349-50. Accordingly, the court held that the provision was "a permissible governmental response to a legitimate and substantial public concern." *Id.* at 350. We find the Fourth Circuit's analysis persuasive, and we join in it in upholding the distinction between professional charitable solicitors and in-house charitable solicitors.

The appellees argue that this distinction renders the Act underinclusive because a ringing phone disrupts residential privacy whether the caller is a volunteer or a professional. They claim that the exemption of in-house charitable fundraisers demonstrates that the Act is not related to residential privacy. Although exceptions from an otherwise legitimate regulation of speech may undermine the government's reasons for the regulation, *City of Ladue v. Gilleo*, 512 U.S. 43, 52, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994), we do not perceive that to be the case here. North Dakota's do-not-call statute does not give one side of a debate an advantage over the other, but rather it reduces the total number of unwelcome telephone calls to private residences. "The validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." *Ward*, 491 U.S. at 801. In the case before us, the overall problem is the intrusion on residential privacy caused by unwanted telephone solicitation. We are satisfied that the Act furthers the state's interest in preserving residential privacy.

Additionally, the Act does not burden more speech than is necessary to further the State's interest in residential privacy. The place to which a regulation applies must be taken into account in determining whether a statute is narrowly tailored. *Hill*, 530 U.S. at 728. As the Court pointed out in *Frisby v. Schultz*, "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." 487 U.S. at 484-85. Accordingly, we find it relevant that the Act applies only to personal residences. Further, a content-neutral and viewpoint-neutral opt-in provision like the one here limits the degree of government interference with *First Amendment* interests. See *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970) (statutory scheme giving sole discretion to private citizen to determine whether material was "erotically arousing or sexually provocative" avoided "possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a government official"); see also *Mainstream Mktg. Servs., Inc. v. F.T.C.*, 358 F.3d 1228, 1242 (10th Cir. 2004) (finding the national do-not-call registry narrowly tailored because "it restricts only calls that are targeted at unwilling recipients"). Although the opt-in nature of the Act is not dispositive, we find it important that the Act's restriction is triggered only when a resident joins the do-not-call registry. Absent this affirmative private action, there is no restriction on a charity's use of professional charitable solicitors. Because the Act prohibits only calls to unwilling residents in their homes, we hold that the Act is narrowly tailored to serve the government's substantial interest in protecting residential privacy.

Finally, the Act need not be the least restrictive means to satisfy the tailoring requirement. *Hill*, 530 U.S. at 726. Although exempting all charitable solicitations from the Act or requiring a charity-specific do-not-call list would be less restrictive than North Dakota's regulation, we are not con-

vinced that the existence of these options renders the Act unconstitutional. Because this narrowly drawn, content-neutral statute does not entirely foreclose any means of communication, we are satisfied that the Act is sufficiently tailored to pass constitutional muster.

C.

We turn, then, to the final consideration under Pryor, whether North Dakota's regulation substantially limits charitable solicitations. We conclude that it does not. The Act prohibits calls to the homes of residents who have chosen not to receive calls from professional charitable solicitors. The Act does not foreclose all means of charitable solicitation directed at these residents. Employees or volunteers may solicit funds from all North Dakota residents, and professionals may solicit funds from residents who have not registered with the state's do-not-call list. Further, the charities may launch fundraising campaigns through the mail or in person. Although the Act restricts charitable solicitation, it leaves open several alternative channels of communication. Accordingly, we conclude that the Act does not substantially limit charitable solicitation.

IV.

Appellees argue that the Act is overbroad because it "makes no legitimate effort to distinguish telemarketing calls affecting residential privacy and innocuous speech" and it prevents unknown charities from soliciting North Dakota residents who have registered with the state's do-not-call list. Appellees' Brief at 26. "For a statute to fail on overbreadth grounds, 'there must be a realistic danger that the statute itself will significantly compromise recognized *First Amendment* protection of parties not before the Court.'" *Pryor*, 258 F.3d at 856 (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)). The North Dakota statute does not present that danger. When

North Dakota citizens register on the do-not-call list, they choose to exclude telephone solicitation from their homes. The registrants have decided that the Act's banned phone calls intrude on their residential privacy. Further, unknown charities will be treated the same as the appellees. Appellees simply cannot support their claim that the Act impermissibly curtails the *First Amendment* rights of parties not before this court.

Conclusion

In holding that the Act does not run afoul of the *First Amendment*, we echo Judge Wilkinson's observations:

> In reviewing these rules, we have no wish to exaggerate. Not every home is a "peaceable kingdom." And it is not the end of the world when a family receives an abandoned call or a late night call that interrupts its evening. But it is one more small strain that families already stressed by twenty-first century life are forced to endure. Our Constitution does not require that we add to family burdens by forbidding even the most reasonable and minor restrictions on telemarketing practices. . . . Our Constitution does not prevent the democratic process from affording the American family some small respite and sense of surcease.

Nat'l Fed'n of the Blind v. F.T.C., 420 F.3d at 343, 351.

North Dakota's narrowly tailored do-not-call statute significantly furthers the state's interest in residential privacy. The Act does not substantially limit charitable solicitations and is not unconstitutionally overbroad.

The judgment is reversed, and the case is remanded to the district court with direction to dismiss the complaint. Likewise, the order awarding attorney's fees is reversed.

HEANEY, *Circuit Judge*, dissenting.

I agree that the State of North Dakota has a legitimate interest in preserving residential privacy. Because I do not believe that its regulation is narrowly tailored to serve that goal, I respectfully dissent.

A "direct and substantial limitation" on charitable speech "cannot be sustained unless it serves a sufficiently strong, subordinating interest that [the government] is entitled to protect," and is narrowly drawn to serve the interest "without unnecessarily interfering with *First Amendment* freedoms." *Village of Shaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636-37, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). *Sec'y of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 960-61, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984). But see *Nat'l Fed'n of the Blind of Ark., Inc. v. Pryor*, 258 F.3d 851, 854-55 (8th Cir. 2001) (citing the Supreme Court's standard of analysis for restrictions on charitable speech but applying a different, more lenient standard).

Consistent with Supreme Court precedent, the first consideration is whether North Dakota's Act directly and substantially limits charitable solicitation activity. I believe that it does. The law prohibits charities from hiring professional telemarketers to solicit funds for them, and it also provides civil penalties for charities who violate the law. The next inquiry is whether the Act serves a sufficiently strong, subordinating interest that the state is entitled to protect. I agree that protection from the invasion of residential privacy by unwanted solicitations is such an interest. See *Frisby v. Schultz*, 487 U.S. 474, 484, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988); *Carey v. Brown*, 447 U.S. 455, 471, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980); *Rowan v. U.S. Post Office Dep't.*, 397 U.S. 728, 737, 25 L. Ed. 2d 736, 90 S. Ct. 1484 (1970).

I do not agree, however, that North Dakota's regulation is narrowly drawn to serve the government's interest without unnecessarily interfering with *First Amendment* freedoms. First, the Act is overly restrictive. Telefunders in North Dakota are completely prohibited from soliciting charitable funds from members of the do-not-call list, no matter the time of the day nor the percentage of contributions earmarked for the charity. The state does not have a charity-specific do-not-call list, so North Dakotans who are adverse to commercial solicitation but open to charitable solicitation in their homes do not have the opportunity to hear the telefunders' messages. The regulation prevents potentially willing listeners from engaging in discourse about charitable contributions.

Furthermore, the Act is underinclusive. A law is underinclusive, and therefore not narrowly tailored, when it discriminates against some speakers but not others without a legitimate neutral justification for doing so. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993). "Even where, as here, the government has a compelling interest in regulating a particular type of speech, its distinctions between similarly situated actors must reflect a 'reasonable fit' between the restriction and the goal to be achieved by the disparate treatment." *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 351 (4th Cir. 2005) (Duncan, J., dissenting) (quoting *Discovery Network*, 507 U.S. at 417);[3] *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789-92, 101 L. Ed. 2d 669 (1988). Telefunders' and charities' in-house solicitors' mess-

[3] The majority's holding is based in part on the Fourth Circuit's analysis in National Federation of the Blind. The Telemarketing Sales Rule, the regulation at issue in that case, was found to be a constitutional restriction on charitable speech. Notably, the TSR permits telefunders to call members of the national do-not-call list between the hours of 8:00 a.m. and 9:00 p.m., but not members of charity-specific do-not-call lists. The TRS is less restrictive than North Dakota's Act and is inapposite to the analysis before us.

ages are the same, and both types of speakers intrude into the privacy of the home. It remains unclear, then, why the government has restricted the charitable speech of an unknown percentage of callers that invade residential privacy when so many other groups may intrude upon that privacy, thus diminishing the credibility of the government's rationale for restricting telefunders' speech.

The state has provided no statistics to support its assertion that its restriction on telefunders' charitable solicitations will significantly reduce the number of telephone intrusions into private residences. While I might agree as a matter of common sense that prohibiting calls made by telefunders will limit the number of intrusions, the state has failed to support that contention in the record.[4] See *Nat'l Fed'n of the Blind*, 420 F.3d at 353 (Duncan, J., dissenting) ("The FTC again presents *no evidence* that telefunders are more likely to be violators of consumer privacy or engage in abusive telemarketing practices than in-house solicitors. There is *no suggestion* in the record that consumers are more likely to feel that their privacy is invaded when receiving a call from a telefunder than a volunteer or in-house employee of a charitable organization."); *Discovery Network*, 507 U.S. at 426 (holding that a selective ban on commercial newsracks was not justifiable merely because it would "in some small way limit the total number of newsracks").

North Dakota has failed to demonstrate that its ban on telefunders' calls will restore, or even significantly improve, residential privacy. Therefore, I would affirm the district

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[4] Several states submitted amicus briefs to buttress North Dakota's claim, but statistics from other states are not relevant to our assessment of the North Dakota regulation. Also, the majority supports its holding that the Act is narrowly drawn by relying on the North Dakota Legislature's conclusion that telefunders invade residential privacy more regularly than charitable volunteers or employees. Yet nothing in the record provides a basis for the Legislature's conclusion.

court and hold that North Dakota's direct and substantial limitation on charitable speech cannot be sustained because, although it serves a sufficiently strong, subordinating interest that the state is entitled to protect, it is not narrowly drawn to serve the interest.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NORTH DAKOTA,
SOUTHEASTERN DIVISION

Civil File No. A3-03-74

FRATERNAL ORDER OF POLICE, NORTH DAKOTA STATE LODGE AND VETERANS OF FOREIGN WARS-DEPARTMENT OF NORTH DAKOTA,
Plaintiffs,

vs

WAYNE STENEHJEM, in his official capacity as Attorney General of the State of North Dakota,
Defendant.

October 17, 2003, Decided

Judges: RALPH R. ERICKSON, *District Judge*, United States District Court.

MEMORANDUM OPINION AND ORDER

Before the Court is a motion by Plaintiffs for a preliminary injunction (doc. # 5), a motion by Defendant to dismiss the case (doc. # 12), and a motion by Plaintiffs for judgment as a matter of law (doc. # 18). Both parties have filed briefs on these motions, and the Court heard oral arguments on October 10, 2003.

FACTS

During the 2003 Legislative Session, the North Dakota Legislature passed SB 2255, codified at Chapter 51-28, which

prohibits those defined as "telephone solicitors" from calling North Dakota residents who register for a "do-not-call" list. There are several categories of calls that are not considered telephone solicitors. Included in this list is a telephone call made by a volunteer or employee of a charitable organization. The law also requires these volunteers or employees to give their first and last name and the name, address, and telephone number of their charitable organization when they call potential donors.

On July 30, 2003, Plaintiffs filed this lawsuit challenging the constitutionality of Chapter 51-28. Plaintiffs describe the lawsuit as a "facial challenge" to the statute, Compl. at P 1, and part of the relief they request is that the legislation be declared unconstitutional on its face, Compl. at 16.

Plaintiff Fraternal Order of Police, North Dakota State Lodge, is a nonprofit corporation with tax-exempt status under I.R.C. § 501(c)(8). Compl. at P 6. Plaintiff Veterans of Foreign Wars-Department of North Dakota is also a nonprofit corporation with tax-exempt status under I.R.C. § 501(c)(8). Compl. at P 8. Plaintiffs use people other than volunteers or employees of their organizations to solicit funds for them. Therefore, they are defined as telephone solicitors, and the new law prevents them from calling people on the do-not-call list.

ANALYSIS

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court may award summary judgment to a party if there exists no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *DICO, Inc. v. Chemical Co.*, 340 F.3d 525, 529 (8th Cir. 2003). A court views the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the non-moving party. *Medtronic, Inc. v. U.S. Xpress, Inc.*, 341 F.3d 798, 800 (8th Cir. 2003). The moving

party bears the burden of demonstrating that there are no genuine issues of material fact. *Id.* If the moving party meets this burden, then the non-moving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *Id.* Both parties agree that since this case involves the constitutionality of a statute, it may be decided as a matter of law.

I. Commercial Speech Provisions

As a preliminary matter, the Court must address a standing issue. Plaintiffs' Complaint states that it is challenging the entire law as unconstitutional. Compl. at 16. [] "Ordinarily, a party may not facially challenge a law on the ground that it would be unconstitutional if applied to someone else." *SOB, Inc. v. County of Benton*, 317 F.3d 856, 864 (8th Cir. 2003) (citing *New York v. Ferber*, 458 U.S. 747, 767, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)). An exception to this rule is the overbreadth doctrine in *First Amendment* cases. *Id.* However, the overbreadth doctrine does not apply to commercial speech cases. *Bd. of Trs. of the State Univ. of New York v. Fox*, 492 U.S. 469, 481, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989).

Plaintiffs in this case are both charitable organizations; neither is a commercial entity. Therefore, they may not rely on the overbreadth doctrine to challenge the portions of this North Dakota law that regulate commercial speech. *Id.* Even if Plaintiffs had standing, the commercial speech regulations are constitutional.

The Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980). When a law regulates non-misleading commercial speech that concerns a lawful activity, the government may regulate that speech as long as it serves a substantial governmental interest, the regulation directly advances that govern-

mental interest, and the regulation is not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

In *Fed. Trade Comm'n v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 2003 U.S. App. LEXIS 20366, No. 03-1429, 2003 WL 22293798 (10th Cir. Oct. 7, 2003), the Tenth Circuit applied the Central Hudson test to the Federal Trade Commission (FTC) do-not-call list. In the context of a stay request, the court found that the FTC would likely succeed on the merits because its do-not-call list regulating commercial speech was constitutional. *Mainstream Mktg.*, 2003 U.S. App. LEXIS 20366, 2003 WL 22293798, at *8.

Similar to the FTC do-not-call list, North Dakota's law forbids commercial telephone solicitors from calling people who have placed their phone number on the do-not-call list. Defendant asserts that the interest it is seeking to protect is privacy. The legislative history also states that the government was concerned with telemarketing fraud. A state's interest in protecting the "well-being, tranquility, and privacy of the home" is a sufficiently strong, subordinating interest that the government is entitled to protect. *Frisby v. Schultz*, 487 U.S. 474, 484, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988); see also *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737, 25 L. Ed. 2d 736, 90 S. Ct. 1484 (1970). A state's interest in protecting the public from fraud is also a substantial interest. *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 636, 63 L. Ed. 2d 73, 100 S. Ct. 826 (1980). The government's asserted interests are substantial. *Mainstream Mktg.*, 2003 U.S. App. LEXIS 20366, 2003 WL 22293798, at *3.

The second and third parts of the Central Hudson test require that there be a "fit between the legislature's ends and the means chosen to accomplish those ends." 2003 U.S. App. LEXIS 20366, [WL] at *2 (quoting *United States v. Edge Broad. Co.*, 509 U.S. 418, 427-28, 125 L. Ed. 2d 345, 113 S.

Ct. 2696 (1993)). When establishing this reasonable fit, the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87, 131 L. Ed. 2d 532, 115 S. Ct. 1585 (1995)). To demonstrate that this harm is real, the government may use anecdotes, history, consensus, and simple common sense. *Id.* (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628, 132 L. Ed. 2d 541, 115 S. Ct. 2371 (1995)).

Simple common sense indicates that the ringing of the telephone is an intrusion into the tranquility of the home. However, it is not merely the ringing of the phone that is an invasion of privacy; it is also the manner and substance of the call that may be an invasion of privacy. 2003 U.S. App. LEXIS 20366, [WL] at *3. Simple common sense dictates that an unwanted call from a telemarketer would be an invasion of privacy.

The North Dakota Legislature found that many elderly victims in North Dakota have lost $ 10,000 to $ 100,000 or more to telemarketing fraud. It is estimated that up to ten percent of the telemarketing firms operating in the United States in 1996 were fraudulent. Nationwide it is estimated that consumers lose an estimated $ 40 billion each year to telemarketing fraud. *Mainstream Mktg.*, 2003 U.S. App. LEXIS 20366, 2003 WL 22293798, at *6. Based on the ease of proving a violation of do-not-call lists, the legislature found that do-not-call lists deter fraudulent telemarketers.

When determining a reasonable fit, whether a law has an element of private choice in it weighs in favor of a reasonable fit. 2003 U.S. App. LEXIS 20366, [WL] at *8. If the commercial regulation affects more than a minute portion of the asserted harms, this also weighs in favor of a reasonable fit. *Id.* In this case, there is an element of private choice because the individual householder decides whether to place his or her phone number on the do-not-call list. N.D. Cent. Code § 51-

28-09(1)(a) (2003). Nationwide, complaint statistics are much higher for commercial telemarketing calls than for political or charitable calls. *Mainstream Mktg.*, 2003 U.S. App. LEXIS 20366, 2003 WL 22293798, at *6. The great majority of all telemarketing calls are commercial. 2003 U.S. App. LEXIS 20366, [WL] at * 8.

If an individual elects to sign up for the do-not-call list, the law does not completely ban all commercial speech. For example, it allows your dentist to call you and remind you that it is time for semi-annual teeth cleaning. See N.D. Cent. Code § 51-28-01(7)(b) (stating that a person may call someone on the do-not-call list if they have an established business relationship). Also, a salesperson may call as long as the sale will only be completed at a later-face-to-face meeting between the individual solicitor and the person who made the initial call. N.D. Cent. Code § 51-28-01(7)(e). These exemptions reasonably fit the asserted purposes for the law. One who has an established business relationship with you is less likely to engage in fraud, and the recipient of the call is not likely to view such a call as an invasion of privacy. Requiring a face-to-face meeting to complete the sale also reduces the chance for telemarketing fraud by creating more time for a purchaser to contemplate the anticipated transaction. While there are some exceptions for commercial speech in this law, the government is not required to ban all commercial speech in order for there to be a reasonable fit. See *Edge Broad.*, 509 U.S. at 434 (stating that in the commercial speech context, the *First Amendment* does not require the government to "make progress on every front before it can make progress on any front."). Even with these limited exceptions, this law still restricts the great majority of the commercial telemarketing calls. *Mainstream Mktg.*, 2003 U.S. App. LEXIS 20366, 2003 WL 2223798, at *8.

Since there is an element of private choice in this law, this weighs in favor of a reasonable fit. Also, the great majority of

the asserted harms are addressed by this law, which weighs in favor of a reasonable fit.

Plaintiffs lack standing to challenge the commercial portions of this law because the overbreadth doctrine does not apply to commercial speech. Even assuming that Plaintiffs had standing, there is a reasonable fit between the law and the substantial harms that it addresses. Therefore, the provision regulating commercial speech are constitutional.

II. Charitable Speech Provisions

Unlike commercial speech, "charity fund-raising involves speech that is fully protected by the *First Amendment*." *Nat'l Fed'n of the Blind of Arkansas, Inc. v. Pryor*, 258 F.3d 851, 854 (8th Cir. 2001) (citing *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781, 787-88, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988) and *Schaumburg*, 444 U.S. at 633). When analyzing a law that regulates speech, a court must first determine whether the law is content-based or content-neutral. *Cafe Erotica/We Dare to Bare v. Fla. DOT*, 830 So.2d 181, 183 (Fla. Ct. App. 2002). If one must necessarily look at the content of the speech to determine whether the law applies, then the law is content-based. *Arkansas Writers' Project Inc. v. Ragland*, 481 U.S. 221, 230, 95 L. Ed. 2d 209, 107 S. Ct. 1722 (1987) (stating that since the government official had to look at the type of publication to determine whether the tax applied, the law was content-based). In this case, the law requires charities to use volunteers or employees to make their phone calls. Since one must determine what kind of speech is involved to determine whether this law applies, it is content-based. *Id.* A content-based restriction on speech is presumptively invalid. *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003).

In the cases of *Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984) and Schaumburg, the Supreme Court laid out a three-part test for analyzing statutes that affect the solicitation of

funds for charities. *Heritage Publ'g Co. v. Fishman*, 634 F. Supp. 1489, 1498 (D. Minn.1986). First a court must detemine whether the statute constitutes a direct and substantial limitation upon free speech. *Munson*, 467 U.S. at 960; *Schaumburg*, 444 U.S. at 635-36. If the statute does constitute a direct and substantial limitation upon free speech, then it may only be upheld if 1) it serves a sufficiently strong, subordinating interest that the government is entitled to protect and 2) it is narrowly drawn to serve that interest without unnecessarily interfering with *First Amendment* freedoms. *Munson*, 467 U.S. at 960-61.

If the law restricts the manner in which a charity may engage in solicitation activity, it is a direct and substantial limitation upon free speech. *Id. at 961*. This law prevents charities from hiring professional telemarketers to solicit funds for them. N.D. Cent. Code § 51-28-01(7)(c). It also provides civil penalties for charities who violate the law. N.D. Cent. Code § 51-28-15. Since it restricts the manner in which a charity may engage in solicitation activity, this law imposes a direct and substantial limitation. *Id.*

Defendant asserts that the interest it is seeking to protect is privacy. A state's interest in protecting the "well-being, tranquility, and privacy of the home" is a compelling interest. *Frisby*, 487 U.S. at 484; see also *Rowan*, 397 U.S. at 737. The legislative history also reveals that the legislature was concerned with fraud. Protecting consumers from fraud is also a compelling interest. *Schaumberg*, 444 U.S. at 636.

In order to satisfy the narrowly-tailored requirement, the law must target and eliminate "no more than the exact source of the evil it seeks to remedy." *Thorburn v. Austin*, 231 F.3d 1114, 1120 (8th Cir. 2000). The statute does not have to be the least restrictive means of regulation, but it must further the asserted compelling interests in a manner that would be achieved less effectively without the regulation. *Id.* The narrowly-tailored requirement for charitable speech is a more

demanding standard than the reasonable-fit requirement for commercial speech.

This law is not narrowly tailored as applied to the interest in preventing fraud. *Schaumberg*, 444 U.S. at 637. Instead of a direct prohibition on solicitation by charitable telemarketers, the state's criminal laws on fraudulent misrepresentations directly address this interest. *Id.* Not every professional telemarketer hired by a charity will engage in fraudulent activity, so this law targets and eliminates more "than the exact source of the evil it seeks to remedy." *Thorburn*, 231 F.3d at 1120. Since the state's asserted interest in preventing fraud prohibits more speech than the evil that it is targeting, and there is another effective means for addressing this interest, the law is not narrowly tailored. *Id.*

The government's other asserted interest is to protect the privacy of the home. If a householder registers his or her phone number with the do-not-call list, it only prevents certain types of charitable calls from invading the privacy of the home. Those charities that use volunteers or employees may still call and invade one's privacy. Since the law still allows invasions of privacy by charities, it is not narrowly drawn to serve the interest in protecting privacy. See *Munson*, 467 U.S. at 960-61 (stating that the statute must be narrowly drawn to serve the asserted interest).

In the legislative history, there are several references to the small portion of money that is retained by some charities who hire telemarketers for solicitation. For example, there was testimony that only 17% of the funds raised go to the Fraternal Order of Police when it hires telemarketers. If that is a concern of the legislature, then it should consider informing the public of the ways in which their contributions will be spent. *Schaumburg*, 444 U.S. at 637-38. Requiring disclosure of the finances of a charity would "help make contribution decisions more informed while leaving to individual choice the decision whether to contribute to organizations that spend

large amounts on salaries and administrative expenses." *Id.* A disclosure regulation which informed the public would address the legislature's concern without running afoul of free speech concerns. *Id.*

Defendant relies heavily on Rowan in its argument that this law, as applied to charitable speech, is constitutional. In Rowan, the law at issue allowed people to inform the Postmaster General of objectionable mailings, and then the Postmaster General would order that mailer to refrain from sending further mail to the named addressee. 397 U.S. at 730. The key distinction between the law in *Rowan* and North Dakota's law is that the United States Supreme Court found the mail solicitation law in Rowan to be content-neutral. See 397 U.S. at 737.

Defendant argues that the law in Rowan could not be content-neutral because it only applied to erotically arousing or sexually provocative mail. See *id.* at 730. This ignores crucial language in the statute that leaves it within the addressee's "sole discretion" to determine whether the advertisement is "erotically arousing or sexually provocative." *Id.* The Court found that this allowed an addressee to prevent even the mailing of a "dry goods catalog." *Id.* at 737.

The law in this case leaves only one thing to the sole discretion of the recipient: the choice to place his or her phone number on the do-not-call list. After making that choice, then it is the government's discretion that decides what kinds of calls are not permitted. In the case of charities, the government—not the recipient—has decided that only charities that use volunteers or employees to place the phone calls may call those on the do-not-call list. Unlike *Rowan*, North Dakota's law does not leave it to the recipient's sole discretion who may not call them, so it is not content-neutral. Another example of a content-neutral regulation can be found in the Pryor case from the Eighth Circuit. See generally 258 F.3d 851. In Pryor, the court analyzed an Arkansas statute that required a

caller to hang up if the recipient informed the caller that he did not want to hear about the charity, goods, or services. *Id.* at 854 (quoting Ark. Code Ann. § 4-99-201(a)(2) (2000)). While this law exempted political speech; since it only applied to charities, goods, and services; the Eighth Circuit held that it was content-neutral because it made no distinction between charitable and commercial solicitors based on the content of their solicitations. *Id.* at 855 n.3. Unlike Arkansas' law, North Dakota's law does not apply uniformly to commercial speech, and it also distinguishes between charitable and commercial solicitors, which makes North Dakota's law content-based.

In order for North Dakota's restriction on charitable speech to be upheld, it must withstand strict scrutiny. Since the law is not narrowly tailored to protect privacy or to protect against consumer fraud, it is an unconstitutional regulation of speech.

III. Severability

The last issue for the Court is how to strike the unconstitutional limitation on charitable speech from the rest of the statute. "The severability of the valid portions of a state statute which is otherwise found constitutionally infirm is a matter of state law." *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 359 (8th Cir. 1993) (citations omitted). Section 1-02-20 of the North Dakota Century Code states:

> In the event that any clause, sentence, paragraph, chapter, or other part of any title, is adjudged by any court of competent or final jurisdiction to be invalid, such judgment does not affect, impair, nor invalidate any other clause, sentence, paragraph, chapter, section, or part of such title, but is confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment has been rendered.

In this case, the only provision of the law that has been rendered invalid is the restriction on charitable speech. This

invalid provision is only contained in the language starting with the word "but" in 7(c) of section 51-28-01 of the North Dakota Century Code and ending with the word "organization" in 7(c)(2)(b). Finding these clauses invalid does not require invalidating the remainder of the clause in 7(c) of section 51-28-01 of the North Dakota Century Code. N.D. Cent. Code § 1-02-20.

Now the clause simply reads that calls by or on behalf of a charitable organization are not defined as telephone solicitation. N.D. Cent. Code § 51-28-01(7)(c). The Tenth Circuit has found that the FTC would likely succeed in its argument that drawing a distinction between charitable and commercial speech is constitutional. *Mainstream Mktg.*, 2003 U.S. App. LEXIS 20366, 2003 WL 22293798, at *8. [] Therefore, providing an exemption for charitable speech in North Dakota's law does not render it unconstitutional. *Id.*

At oral argument, Defendant urged this Court to strike the entire text of 7(c) if the charitable speech provisions were found to be unconstitutional. The Court is of the opinion that if the entire text of 7(c) is excised from the law, then the entire statute would likely become unconstitutional. If 7(c) was entirely deleted from the law, it would then allow certain commercial speakers to call those people who have signed up for the do-not-call list, see N.D. Cent. Code § 51-28-01(7)(b) & (e), and it would entirely prohibit charitable solicitors from calling people on the do-not-call list. The solution Defendant urges would prefer commercial speech, which is entitled to lesser protection, over charitable speech, which is entitled to the full protection of the *First Amendment*. A law which prefers commercial speech over charitable speech is surely not constitutional. By only excising the barest portions of the law which are unconstitutional, the Court has preserved the bulk of the statute.

DECISION

The restrictions placed on charitable speech in Chapter 51-28 of the North Dakota Century Code are unconstitutional. Those provisions, as detailed above, are excised from the law leaving the remainder of Chapter 51-28 intact. Defendant's Motion to Dismiss is DENIED as to Plaintiffs' challenge to the restrictions placed on charitable speech and GRANTED as to the remainder of the Complaint. Plaintiffs' Motion for Judgment on the Pleadings is GRANTED to the extent its arguments apply to the restrictions on charitable speech. Plaintiffs' Motion for a Preliminary Injunction is MOOT.

IT IS SO ORDERED.

Dated this 17th day of October, 2003.

Ralph R. Erickson, *District Judge*
United States District Court

APPENDIX C

NORTH DAKOTA CENTURY CODE

TITLE 51—Sales and Exchanges

CHAPTER 51-28—Telephone Solicitations

51-28-01. Definitions.

In this chapter, unless the context or subject matter otherwise requires, the terms shall have the meanings as follows:

1. "Automatic dialing-announcing device" means a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called.

2. "Caller" means a person, corporation, firm, partnership, association, or legal or commercial entity that attempts to contact, or that contacts, a subscriber in this state by using a telephone or a telephone line.

3. "Caller identification service" means a telephone service that permits telephone subscribers to see the telephone number of incoming telephone calls.

4. "Established business relationship" means a relationship between a seller and consumer based on a free trial newspaper subscription or on the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the twenty-four months immediately preceding the date of a telemarketing call.

5. "Message" means any telephone call, regardless of its content.

6. "Subscriber" means a person who has subscribed to residential telephone services from a telephone company or

the other persons living or residing with the subscribing person, or a person who has subscribed to wireless or mobile telephone services.

7. "Telephone solicitation" means any voice communication over a telephone line for the purpose of encouraging charitable contributions, or the purchase or rental of, or investment in, property, goods, services, or merchandise, including as defined in subsection 3 of section 51-15-03, whether the communication is made by a live operator, through the use of an automatic dialing-announcing device, or by other means. Telephone solicitation does not include communications:

a. To any subscriber with that subscriber's prior express written request, consent, invitation, or permission.

b. By or on behalf of any person with whom the subscriber has an established personal or business relationship.

c. By or on behalf of a charitable organization that is exempt from federal income taxation under *section 501 of the Internal Revenue Code*, but only if the following applies:

(1) The telephone call is made by a volunteer or employee of the charitable organization; and

(2) The person who makes the telephone call immediately discloses the following information upon making contact with the consumer:

(a) The person's true first and last name; and

(b) The name, address, and telephone number of the charitable organization.

d. By or on behalf of any person whose exclusive purpose is to poll or solicit the expression of ideas, opinions, or votes, unless the communication is made through an automatic dialing-announcing device in a manner prohibited by section 51-28-02.

e. By the individual soliciting without the intent to complete, and who does not in fact complete, the sales presentation during the call, but who will complete the sales presentation at a later face-to-face meeting between the individual solicitor or person who makes the initial call and the prospective purchaser.

f. By or on behalf of a political party, candidate, or other group with a political purpose, as defined in section 16.1-08.1-01.

51-28-02. Use of prerecorded or synthesized voice messages.

A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to a message from a public safety agency notifying a person of an emergency; a message from a school district to a student, a parent, or an employee; a message to a subscriber with whom the caller has a current business relationship; or a message advising an employee of a work schedule.

51-28-03. Message requirements.

When the message is immediately preceded by a live operator, the operator must disclose at the outset of the message:

1. The name of the business, firm, organization, association, partnership, or entity for which the message is being made;

2. The purpose of the message;

3. The identity or kinds of goods or services the message is promoting; and

4. If applicable, the fact that the message intends to solicit payment or commitment of funds.

51-28-04. Requirements on automatic dialing-announcing devices.

A caller may not use an automatic dialing-announcing device unless the device is designed and operated so as to disconnect within ten seconds after termination of the telephone call by the subscriber. A caller may not use an automatic dialing-announcing device that uses a random or sequential number generator unless the equipment excludes calls to the following telephone numbers:

1. Emergency telephone numbers, including 911, of any hospital, medical physician, health care facility, ambulance or emergency medical provider, fire protection facility, or law enforcement agency.

2. Any guest room or patient room of a hospital, health care facility, elderly care home, or similar establishment.

3. A paging service, a cellular telephone service, a specialized mobile radio service, or any service for which the called party is charged for the call.

4. The telephone numbers maintained on a do-not-call list established pursuant to section 51-28-09.

51-28-05. Time of day limit.

A caller may not use an automatic dialing-announcing device nor make any telephone solicitation before eight a.m. or after nine p.m. at the telephone subscriber's location.

51-28-06. Prohibited telephone solicitations.

A caller may not make or cause to be made any telephone solicitation to the telephone line of any subscriber in this state who, for at least thirty-one days before the date the call is

made, has been on the do-not-call list established and maintained or used by the attorney general under section 51-28-09 or the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310.

51-28-07. Identification by caller.

Any caller who makes a telephone solicitation to a subscriber in this state shall immediately and clearly state at the beginning of the call the caller's true first and last name, the caller's telephone number, the caller's city and state of location, and the name of the business on whose behalf the telephone solicitation is made.

51-28-08. Interference with caller identification.

A caller who makes a telephone solicitation to a subscriber in this state may not knowingly use any method to block or otherwise deliberately circumvent the subscriber's use of a caller identification service.

51-28-09. Establishment of do-not-call list—Federal trade commission do-not-call registry.

1. The attorney general shall establish and maintain a list of telephone numbers of subscribers who object to receiving telephone solicitations. The attorney general may fulfill the requirements of this section by contracting with an agent for the establishment and maintenance of the list or by using the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310. The attorney general may adopt rules governing the establishment, distribution, and operation of the do-not-call list, as the attorney general deems necessary and appropriate to fully implement the provisions of this chapter, in addition to the following provisions:

a. Any subscriber may contact the attorney general or the attorney general's agent and give notice, in the manner

prescribed by the attorney general, that the subscriber objects to receiving telephone solicitations. The attorney general shall add the telephone number of any subscriber who gives notice of objection to the list maintained pursuant to this section.

b. Any notice given by a subscriber under this section is effective for five years unless revoked by the subscriber. Any subsequent notices given by the same subscriber related to a different telephone number are separate from the original notice.

c. The attorney general shall allow subscribers to give notice under this section by mail, telephone, or electronically.

d. The attorney general shall establish the procedures by which a person wishing to make telephone solicitations may obtain access to the list. To the extent practicable, those procedures shall allow for access to paper or electronic copies of the list.

e. The attorney general may include in the list established under this section subscribers who live in North Dakota and are included in the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310. The attorney general may provide to the federal trade commission the telephone numbers of North Dakota subscribers who are in the attorney general's do-not-call list or who have otherwise notified the attorney general of the subscriber's objection to receiving telephone solicitations for inclusion in the national do-not-call registry.

f. A person or entity desiring to make telephone solicitations shall pay a fee, payable to the attorney general, for access to, or for paper or electronic copies of, the list established under section 51-28-09. The fee for acquisition of the list may not exceed two hundred dollars per quarter, or eight hundred dollars per year.

2. Notwithstanding any other provision of this chapter, the attorney general may designate the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 61, as the state do-not-call list.

51-28-10. Release of information.

Information contained in the list established under section 51-28-09 may not be used for any purposes except compliance with this chapter or in a proceeding or action under this chapter or chapter 51-15. The information contained in the list is an exempt record as defined in section 44-04-17.1.

51-28-11. Private enforcement.

Any person who receives a telephone solicitation or message in violation of this chapter may bring an action to enjoin such violation, or for damages, or both. The court may award the plaintiff the plaintiff's actual damages or damages up to two thousand dollars for each violation, whichever is greater. The court may award the plaintiff costs, expenses, and reasonable attorney's fees. This section shall not limit any other claims the person may have against the caller.

51-28-12. Limitation of actions.

No action or proceeding may be brought under this chapter:

1. More than one year after the person bringing the action knew or should have known of the alleged violation; or

2. More than one year after the termination of any proceeding or action by the attorney general, whichever is later.

51-28-13. Powers of the attorney general—Remedies—Injunction—Other relief.

When it appears to the attorney general that a person has engaged in, or is engaging in, any practice declared to be unlawful by this chapter, the attorney general, in enforcing this chapter, has all powers provided in this chapter or chapter 51-15, and may seek all remedies in this chapter or chapter 51-15.

51-28-14. Cease and desist orders.

When it appears to the attorney general that a person has engaged in, or is engaging in, any practice declared to be unlawful by this chapter or by any rule or order of the attorney general issued under this chapter, the attorney general, without notice and hearing, may issue any cease and desist order which the attorney general deems necessary or appropriate in the public interest, including if any person fails or refuses to file any statement or report, or obey any subpoena issued by the attorney general under this chapter or chapter 51-15. A person aggrieved by an order issued under this section may request a hearing before the attorney general if a written request is made within ten days after the receipt of the order. An adjudicative proceeding under this section must be conducted in accordance with chapter 28-32, unless otherwise specifically provided herein.

51-28-15. Civil penalties in an adjudicative proceeding.

When it appears to the attorney general that a person has engaged in, or is engaging in, any practice declared to be unlawful by this chapter or by any rule or order of the attorney general issued under this chapter, the attorney general may impose by order and collect a civil penalty against any person found in an adjudicative proceeding to have violated any provision of this chapter, or any rule or order adopted under this chapter, in an amount not more than

two thousand dollars for each violation of this chapter or any rule or order adopted under this chapter. The attorney general may bring an action in district court to recover penalties under this section.

51-28-16. Costs recoverable in adjudicative proceeding—Hearing costs.

If the attorney general prevails in an adjudicative proceeding pursuant to section 51-28-14 or 51-28-15, the attorney general may assess the nonprevailing person for all adjudicative proceeding and hearing costs, including reasonable attorney's fees, investigation fees, costs, and expenses of any investigation and action brought under the provisions of this chapter.

51-28-17. Civil penalties in court proceeding.

The court may award the attorney general civil penalties of not more than two thousand dollars per violation of this chapter. A violation of this chapter constitutes a violation of chapter 51-15 and the court may award civil penalties under section 51-15-11.

51-28-18. Costs recoverable in court proceeding.

The attorney general is entitled to an award of reasonable attorney's fees, investigation fees, costs, and expenses of any investigation and action brought under the provisions of this chapter.

51-28-19. Separate violations—Nonexclusive remedies and penalties.

For each remedy or penalty under this chapter or chapter 51-15, or otherwise provided by law, each telephone solicitation or message shall constitute a separate violation for purposes of an adjudicative proceeding or an action in district court. The remedies, duties, prohibitions, and penalties of this

chapter are not exclusive and are in addition to all other causes of action, remedies, and penalties in chapter 51-15, or otherwise provided by law.

51-28-20. Caller identification service nonliability.

No provider of caller identification service shall be held liable for violations of this chapter committed by other persons or entities.

51-28-21. Disposition of fees, penalties, and recoveries.

All fees, penalties, and recoveries of attorney's fees, investigation fees, costs, and expenses collected pursuant to this chapter shall be retained by the attorney general for enforcement of this chapter, including to pay costs, expenses, and attorney's fees and salaries incurred in the operation of the attorney general's consumer protection and antitrust division. However, the attorney general may deposit any excess funds not required for enforcement of this chapter in the attorney general refund fund under section 54-12-18.

51-28-22. Venue.

The attorney general or a plaintiff in a private enforcement action may bring an action pursuant to this chapter in either the county of the telephone subscriber's residence or Burleigh County.

SUPREME COURT, U.S.
FILED
APR 10 2006
OFFICE OF THE CLERK

No. 05-1149

In the Supreme Court of the United States

FRATERNAL ORDER OF POLICE, NORTH DAKOTA STATE LODGE, and VETERANS OF FOREIGN WARS - DEPARTMENT OF NORTH DAKOTA,
Petitioners,

v.

WAYNE STENEHJEM, in his official capacity as Attorney General of the State of North Dakota,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment permits states to enforce consumer requests not to be solicited by contract telemarketers calling on behalf of charities?

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STATEMENT OF THE CASE

A. The Telephone Solicitations Act.

Petitioners, nonprofit corporations who use paid telephone solicitors working under contract to solicit funds from North Dakota consumers, seek review of a decision of the United States Court of Appeals for the Eighth Circuit that rejected Petitioners' First Amendment challenge to North Dakota's Telephone Solicitations Act, N.D. Cent. Code ch. 51-28.

To address the growing problem of increased telemarketing calls and allow North Dakota citizens to regain privacy within their residences, in 2003 the North Dakota Legislature enacted N.D. Cent. Code ch. 51-28 (the Act). The Act permits any subscriber of residential telephone service to request the inclusion of that subscriber's residential telephone number on a do-not-call list maintained by the North Dakota Attorney General. N.D. Cent. Code § 51-28-09(1)(a), Pet. App. 31a-32a. The Act prohibits making "telephone solicitations" to registered telephone numbers. N.D. Cent. Code § 51-28-06, Pet. App. 30a-31a. The Act defines "telephone solicitation" as "any voice communication over a telephone line for the purpose of encouraging charitable contributions, or the purchase or rental of, or investment in, property, goods, services, or merchandise . . . ." N.D. Cent. Code § 51-28-01(7), Pet. App. 28a.

The Act thus protects subscribers who choose to place their residential telephone numbers on the list from a broad spectrum of telephone solicitations. The Act does not, however, prohibit all such calls. In particular, it does not proscribe telephone solicitations to registered subscribers "[b]y or on behalf of a charitable organization that is exempt

from federal income taxation under section 501 of the Internal Revenue Code" if the call is made by "a volunteer or employee of the charitable organization . . . ." N.D. Cent. Code § 51-28-01(7)(c), Pet. App. 28a.

The North Dakota Attorney General is charged with implementing and administering the Act. N.D. Cent. Code § 51-28-09, Pet. App. 31a-33a. The Act authorizes the Attorney General to seek injunctive relief and penalties against violators of the Act. N.D. Cent. Code §§ 51-28-13, 51-28-15, 51-28-17, Pet. App. 34a-35a.[1] In addition, subscribers may seek private enforcement of the Act. N.D. Cent. Code § 51-28-11, Pet. App. 33a.[2]

B. The Proceedings Below.

Petitioners filed suit in the United States District Court for the District of North Dakota seeking a judgment declaring that

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[1] Petitioners assert the Attorney General may issue a cease and desist order without notice or hearing. Pet. 7. If the Attorney General issues a cease and desist order pursuant to N.D. Cent. Code § 51-28-14, the person aggrieved by the order is entitled to a hearing. The hearing must be conducted in accordance with the North Dakota Administrative Agencies Practice Act (N.D. Cent. Code ch. 28-32). N.D. Cent. Code § 51-28-14, Pet. App. 34a. In this facial challenge, Petitioners have not asserted the Attorney General has enforced the Act in violation of anyone's due process rights, much less the rights of Petitioners.

[2] The Act also restricts the use of automatic dialing-announcing devices, the time of day telephone solicitations may be made, and the use of methods to block a subscriber's caller identification service. N.D. Cent. Code §§ 51-28-02, 51-28-03, 51-28-04, 51-28-05, 51-28-08, Pet. App. 29a-31a. Petitioners did not challenge those provisions of the Act.

the Act, on its face, violates their rights under the First Amendment. Apparently believing a law is "content based" even if it merely requires the identification of speakers to determine its application, the district court treated the Act as content based because it prohibits solicitations by charities' contract telemarketers but not by their employees and volunteers. Pet. App. 20a. Applying strict scrutiny, the district court concluded the Act serves a compelling governmental interest, but found it not "narrowly drawn" because it does not apply to *all* charitable solicitations. Pet. App. 21a, 22a. Accordingly, the district court found the Act unconstitutional to the extent its restrictions apply to charitable speech. Pet. App. 26a. Although no commercial speakers are plaintiffs in this case, the district court also reviewed the Act under the commercial speech doctrine and found it to be entirely valid under that test. Pet. App. 16a-20a, 26a.

The Eighth Circuit reversed. Observing that professional charitable solicitation is fully protected speech, the Court of Appeals, citing *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), stated "[t]he principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message the speech conveys." Pet. App. 3a. Further, correcting the district court, the decision also noted that "[r]egulation of expressive activity is content neutral if it is justified without reference to the content of the regulated speech." Pet. App. 3a. Applying these principles to the statute, the Eighth Circuit found "it is evident the Act is content neutral." Pet. App. 3a. It wrote:

> First, North Dakota has not distinguished between professional and in-house charitable solicitors because of any disagreement with the message that would be

> conveyed, for the message would be identical regardless of who conveyed it. Second, the regulation can be justified without reference to the content of the regulated speech, for North Dakota's interest is in protecting residential privacy.

Pet. App. 3a.

Finding the Act content neutral, the Eighth Circuit applied the test derived from *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980), considering: "(a) whether the State had a sufficient or 'legitimate' interest; (b) whether the interest identified was 'significantly furthered' by a narrowly tailored regulation; and (c) whether the regulation substantially limited charitable solicitations." Pet. App. 4a. Like the district court, the Eighth Circuit held residential privacy is a "significant" government interest, and "[t]he rationale underlying the North Dakota regulation falls within this significant interest." Pet. App. 4a-5a. It also ruled the Act is narrowly tailored because "North Dakota's goal of ensuring residential privacy would be achieved less effectively if the legislature exempted professional charitable solicitors from the Act." Pet. App. 5a. Furthermore, the Eighth Circuit ruled, because the Act applies only to personal residences and contains a content neutral and viewpoint neutral opt-in provision, it "does not burden more speech than is necessary to further the State's interest in residential privacy." Pet. App. 7a.

Although he agreed "North Dakota has a legitimate interest in preserving residential privacy," and that "the Act serves a sufficiently strong, subordinating interest that the state is entitled to protect," Judge Heaney dissented from the majority opinion because he did not believe the Act is narrowly tailored. Pet. App. 10a-11a.

REASONS FOR DENYING THE PETITION

Petitioners have failed to identify any grounds warranting a grant of certiorari in this case. First, this case does not present the issue asserted by petitioners because the Act in no way represents an "extension of the national do-not-call registry." Pet. (i). Instead, the Act sets forth its own substantive provisions that do not depend on federal law for content. Accordingly, the case presents no inconsistency between the Act and any national no-call programs enforced by the FCC and the FTC. Furthermore, Petitioners never before asserted such a quasi-preemption claim in this case, and the decision below certainly does not purport to address it. Perforce, there is no conflict between the Eighth Circuit decision and the decisions from the Fourth and Tenth Circuits concerning the FCC and FTC programs.

Second, the decision below does not conflict with any decisions of this Court. To the contrary, the Eighth Circuit scrupulously followed and correctly applied this Court's First Amendment precedents in upholding the Act, which, after all, merely gives force to individual consumer preferences not to be disturbed in the privacy of their own homes.

I. Petitioners mischaracterize the decision below in an effort to generate a more interesting issue for review and to manufacture a material conflict with other circuits.

In a rather obvious attempt to attract more attention to their cause and to create an intra-circuit conflict where none exists, in their question presented, Petitioners grossly misrepresent the underlying issues in this case. In short, there is no purported "extension of the national do-not-call registry" at stake, only an independent state substantive no-

call law that, in compliance with federal mandates, protects all North Dakota citizens who have also sought the protection of federal no-call laws. Furthermore, Petitioners have never before asserted this issue.

A. The Eighth Circuit did not extend the national do-not-call registry.

Neither the Act nor the decision below extends any national do-not-call laws to charitable speech. To understand why this is so, it is important to understand the basic structure of the federal and state no-call laws.

Congress has separately authorized the FCC and the FTC to enforce telemarketing restrictions, and those agencies have promulgated separate rules to do so. *See* 15 U.S.C. §§ 6101, *et seq.*; 16 C.F.R. §§ 310.1, *et seq.*; 47 C.F.R. §§ 64.1200, *et seq.* These rules have, for present purposes, two components. The first is substantive. The FCC's rule prohibits most commercial sales calls to registered consumers. *See* 47 C.F.R. § 64.1200(c)(2). The FCC lacks statutory jurisdiction, however, over some entities that make telemarketing calls, including charities and those calling on their behalf. *See, e.g.*, 47 C.F.R. § 64.1200(f)(9)(iii). Due to its general jurisdiction over professional telemarketers, the FTC's rule covers many entities outside the FCC's jurisdiction. *See* 15 U.S.C. §§ 6102(a), 6106(4); 16 C.F.R. §§ 310.2(u), (bb), (cc); 68 Fed. Reg. 4580-01, 4585 (Jan. 29, 2003); *National Fed'n of the Blind v. Federal Trade Commission*, 420 F.3d 331, 334-36 (4th Cir. 2005), *pet. for cert. filed*, 74 U.S.L.W. 3438 (U.S. Jan. 23, 2006) (No. 05-927) (discussing FTC jurisdiction). For its part, however, the FTC has decided that telemarketers calling on behalf of charities need only to maintain charity-specific no-call lists

rather than refrain from calling all registered consumers. 16 C.F.R. §§ 310.4(b)(1)(iii)(A), 310.6(a).

The second component of the FCC and FTC no-call rules is the registry shared by those agencies. Congress requires the FCC and FTC enforce their respective rules with respect to a single national no-call registry, meaning consumers who register for the protections from one agency automatically receive the protections of both. 47 U.S.C. § 227(c)(3); 16 C.F.R. § 310.4(b)(1)(iii)(3); 18 F.C.C.R. 14014, 14017 (June 26, 2003). By doing this, consumers need not register multiple times with the federal government.

Congress has also enacted a provision requiring states that enforce their own registry-based no-call laws to include on their registries state residents who have registered for federal protection. 47 U.S.C. § 227(e)(2). So, for example, North Dakota must enforce its own no-call law to protect North Dakota residents who have registered for federal protection, even if those residents have not separately registered for state protection with the North Dakota Attorney General. For the sake of efficiency, North Dakota does not maintain a separate state registry; it merely enforces its substantive no-call law for the benefit of North Dakota residents who have registered for the federal list, *as it is required to do by federal law*. (In addition to requiring states to include the federal do-not-call list in their own registries, Congress stated that the FCC database "shall . . . be designed to enable States to use the [database] . . . for purposes of administering or enforcing state law." 47 U.S.C. § 227(c)(3)(J)).

Petitioners mischaracterize this legislative framework as being the equivalent of stretching the substantive federal no-call laws to cover charities, but this is plainly not the case. It is true that neither the FCC nor the FTC prohibits

telemarketing calls on behalf of charities to all federally-registered telephone subscribers.[3] But neither do they prohibit states from enforcing their own substantive laws prohibiting such calls. Indeed, because Congress has not authorized the FCC to regulate charitable solicitations, the FCC lacks jurisdiction to preempt the states in this area. *See National Coalition of Prayer, Ir v. Carter*, No. 02-0536-C, 2005 WL 2253601, at *15-16 (S.D. Ind. Sept. 2, 2005). And for its part, the FTC has expressly *disclaimed* any intent to preempt states when it comes to regulating charitable solicitations. 68 Fed. Reg. 4580-01, 4638 n.696 (Jan. 29, 2003).[4] So, that leaves North Dakota in the entirely unremarkable position of enforcing its own law for the benefit of self-selected North Dakota residents. That self-selection happens by North Dakota residents registering on the national do-not-call registry.

Accordingly, Petitioners' assertion the decision below conflicts with decisions from the Tenth and Fourth Circuits concerning the substantive FCC and FTC no-call regulations

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[3] Petitioners' assertion the FTC exempted charitable telephone solicitations for the national no-call registry due to First Amendment concerns is inaccurate. Pet. 12. To the contrary, the FTC specifically noted the future possibility of requiring "telemarketing calls soliciting charitable donations to comply with the national 'do-not-call' registry requirements." 68 Fed. Reg. 4580-01, 4637.

[4] For these reasons, Petitioners' assertion that "[d]eference should be given to the FTC's exemption of charitable calls from the national do-not-call registry" is misguided. Pet. 12. Whether or not deference is owed to an agency's assertion of preemptive authority, agency deference has no bearing on the First Amendment challenge before the Eighth Circuit.

is utterly implausible. *Mainstream Mktg. Servs., Inc. v. F.T.C.*, 358 F.3d 1228 (10th Cir. 2004), *cert. denied*, 543 U.S. 812 (2004), upheld the constitutionality of the FCC's commercial sales no-call law. Because the FCC no-call law only applies to commercial speech, the decision applied the *Central Hudson* analysis. The Tenth Circuit decision says nothing about no-call laws that apply to charitable solicitations. In contrast, because the challenged Act applies to both commercial and non-commercial speech, the Eighth Circuit applied the analysis directed by this Court in *Schaumburg*. Pet. App. 4a. Hence, the issues addressed, and tests applied, by the Tenth and Eighth Circuits are materially different. The Tenth Circuit's own opinion makes it clear the court was not holding a no-call law had to apply only to commercial speech to be constitutional. It wrote: "We express no opinion as to whether the do-not-call registry would be constitutional if it applied to political or charitable callers." *Id.* at 1233 n.2.

Petitioners' attempt to manufacturer a split with the Fourth Circuit's decision in *National Fed'n of the Blind* is likewise futile. In *National Fed'n of the Blind*, the Fourth Circuit, in an opinion by Judge Wilkinson, upheld the FTC's requirements that charities using professional fundraisers comply with a charity-specific do-not-call list. The decision did not address either the substantive validity of more general no-call laws applicable to charitable solicitations or the preemptive effect of the FTC's rule. Indeed, not only is the lower court's decision consistent with the Fourth Circuit's decision in *National Fed'n of the Blind*, it partially relied upon it. *See* Pet. App. 6a. Furthermore, consistent with the Eighth Circuit's decision, *see* Pet. App. 4a, the Fourth Circuit applied *Schaumburg* and its progeny because the charity-specific do-not-call list applies to non-commercial speech, *see* 420 F.3d at 338. The purported split does not exist.

Although the Eighth Circuit partially relied on the *National Fed'n of the Blind* decision, that reliance did not include the Fourth Circuit's "limited jurisdiction" analysis. As is evident from a plain reading of its decision, the Eighth Circuit quoted *National Fed'n of the Blind* for the Fourth Circuit's analysis of balancing the rights of charities to communicate with potential donors and the potential donors' right to enjoy residential peace, a legitimate and substantial concern. Pet. App. 6a. Because the Eighth Circuit did not adopt or rely on the "limited jurisdiction" rule, Petitioners' lengthy diatribe on this issue is a red herring, designed to create an issue for review. Pet. 21-22.

In short, the decision below in no way addresses federal regulation of charitable solicitations; it does not address or impact the authority of the FTC and the FCC. Instead it is limited to the constitutionality of a state do-not-call law that applies to both commercial and non-commercial calls. Respondent is aware of only one other decision addressing the constitutionality of such a law. In that decision, a United States District Court upheld Indiana's do-not-call statute. *See Carter*, 2005 WL 2253601, at *16. Like North Dakota's Act, Indiana's statute does not apply to telephone calls made by volunteers or employees of a charitable organization. Ind. Code 24-4.7-2-7. And, like the Eighth Circuit, the Indiana federal district court found the exemption constitutional. *Carter*, 2005 WL 2253601, at *16. Thus, the Eighth Circuit's decision is consistent with the only other decision directly on point.

B. The issue stated in Petitioners' Question Presented was never raised below.

Regardless of how they characterize the Act vis-à-vis the national no-call registry, the fact remains Petitioners never

raised this issue, which, after all, sounds more in preemption than in free speech. The Eighth Circuit was *not* called upon to interpret the provisions of, or address the constitutionality of, the national do-not-call registry or to consider whether those provisions somehow prevent North Dakota from enforcing its own no-call law. As plainly indicated in the complaint, and as addressed by both the district court and the Eighth Circuit, this case is limited to a facial First Amendment challenge of N.D. Cent. Code ch. 51-28. At no time did Petitioners allege below that the Act conflicted with, or impermissibly extended, the national do-not-call registry. And the lower court in no way addressed application of the national do-not-call registry and its regulations. Petitioners may not raise this issue for the first time here. And, even if they could, the lack of any substantive decision below renders this case a poor vehicle for addressing the issue. *See Clingman v. Beaver*, 544 U.S. 581, 125 S. Ct. 2029, 2041 (2005); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004).

II. The decision below does not conflict with any decision of this Court.

For decades it has been well-settled law that charitable solicitations are within the protections of the First Amendment. *See Schaumburg*, 444 U.S. 620 and cases cited therein. The Eighth Circuit properly applied that law, finding "professional charitable solicitation is fully protected speech." Pet. App. 2a. Equally well established is the principle that the government may regulate the time, place, or manner of expressive activity, even charitable speech, so long as the restrictions are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communications. *See, e.g.*, *Ward*, 491 U.S. at 791; *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487

U.S. 7[illegible]802 (1988); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648-49 (1981). The lower decision represents a straight-forward application of this black letter law.

A. The Eighth Circuit did not subject the Act to "lesser scrutiny," but instead properly deemed the Act to be content neutral.

The Eighth Circuit, consistent with this Court's jurisprudence, recognized charitable speech is afforded higher protection than commercial speech. It specifically held "professional charitable solicitation is fully protected speech." Pet. App. 2a. Contrary to Petitioners' assertion, the lower court did not subject the Act to "lesser scrutiny." What Petitioners actually challenge is the Eighth Circuit's application of the well-established time, place, and manner doctrine. But a mere alleged misapplication of law does not ordinarily warrant review by this Court. Furthermore, the Eighth Circuit did not misapply this Court's jurisprudence. To the contrary, it scrupulously adhered to it.

The decision below did not deviate from this Court's cases in determining the Act to be content neutral. As stated in *Ward*, 491 U.S. at 791, "[t]he principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message the speech conveys." Pet. App. 3a. Quoting *Ward*, 491 U.S. at 791, the Eighth Circuit explained that "'[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" Pet. App. 3a. *See also Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 643 (1994) ("Laws that confer benefits or impose burdens on speech without

reference to the ideas or views expressed are in most instances content neutral.").

Petitioners' assertion the Act is not content neutral is primarily based on the Act's exception permitting charities to use volunteers or employees, but not contract telemarketers, to make calls to residents who have registered their residential telephone numbers. But this exception makes no distinction based on the content of solicitations. It also applies irrespective of viewpoint or mission, and is justified for reasons unrelated to the content of the speech. The Eighth Circuit's analysis on this issue is fully consistent with this Court's First Amendment precedent.

The distinction between charitable solicitations by employees and volunteers versus professional telemarketers is not content based. It is based upon sheer volume. A charity using professional telemarketers is typically able to dial substantially more residential telephone numbers than if the charity used its own volunteers and employees. Because professional telemarketers typically earn a percentage of each donation, they also have a direct financial incentive to dial as many residential telephone numbers as possible; charities' volunteers and employees typically do not have these same incentives. Thus, this distinction is justified by the volume of invasive calls, which is directly related to the purpose of the Act, not content. *See Carter*, 2005 WL 2253601, at *13 (discussing Indiana's legislative finding that professional telemarketers "are likely to resort to more aggressive tactics, make calls when residents least desire them, draw on their expertise in overcoming residents' attempts to terminate the calls, and make as many solicitation calls as possible in a given time-frame"). The exception applies equally, irrespective of message or viewpoint of the caller.

This exception also represents a balance drawn by the Legislature between the interests of charities and the privacy interests of residential telephone subscribers. Though the Act could lawfully have banned all calls by charities to registered subscribers, the Legislature instead sought only to significantly curb such calls by limiting, but not completely eliminating, charities' intrusions into homes that prefer privacy. Such action is appropriate because it significantly furthers residential privacy. *See United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993) ("Nor do we require that the Government make progress on every front before it can make progress on any front."); *see also National Fed'n of the Blind,* 420 F.3d at 349; *Moser v. F.C.C.*, 46 F.3d 970, 974-75 (9th Cir. 1995) ("Congress may reduce the volume of intrusive telemarketing calls without completely eliminating the calls."). By permitting calls from charities' volunteers and employees only, the Legislature knew registered telephone subscribers would significantly reduce the chances of being inundated with calls. *See Carter*, 2005 WL 2253601, at *8.

Far from being "baffling," Pet. 16, the Eighth Circuit's determination the Act is content neutral is based upon and in accordance with this Court's precedent. It is also consistent with the only other decision directly on point. *See Carter*, 2005 WL 2253601, at *16.

B. The Eighth Circuit's time, place, and manner analysis falls squarely within this Court's precedents.

A content neutral regulation may regulate the time, place, or manner of expressive activity if the restrictions are narrowly tailored to serve a significant governmental interest and leave open ample alternatives for communications.

Ward, 491 U.S. at 791. The decision below properly applied this well-established First Amendment principle.

1. The Act serves a significant governmental interest.

The Act's chief aim is to protect residential privacy from being disturbed by unwanted telemarketing calls, including those made by professional telemarketers on behalf of charities. Residential privacy is a significant, indeed compelling, governmental interest, as this Court has frequently concluded. *See Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Carey v. Brown*, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("[I]n the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."). The listener's interest in avoiding unwanted speech is at its greatest where the speech threatens residential privacy. *See Hill v. Colorado*, 530 U.S. 703, 717 (2000) (stating "[t]he right to avoid unwelcome speech has special force in the privacy of the home"); *Frisby*, 487 U.S. at 484-85 (acknowledging the "unique nature of the home" and that, "[a]lthough in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different"; "individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom"); "There simply is no right to force speech into the home of an unwilling listener."); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970) ("categorically reject[ing] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another"); *National Fed'n of the Blind of Ark, Inc. v. Pryor*,

258 F.3d 851, 855 (8th Cir. 2001) (stating "*Rowan* confirms that the State has a legitimate governmental interest in adopting reasonable restrictions to protect its citizens from unwanted telephone calls to their homes").

In the context of telemarketing regulations, lower state and federal courts have, like the decision below, consistently deemed residential privacy to be a sufficiently strong subordinating justification to support content neutral speech restrictions. *See, e.g.*, *National Fed'n of the Blind*, 420 F.3d at 339-40; *Bland v. Fessler*, 88 F.3d 729, 734 (9th Cir. 1996) (stating the government's "significant interest in protecting residential privacy is well established"); *Mainstream Mktg.*, 358 F.3d at 1238-39 (finding protecting residential privacy to be a substantial governmental interest); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1554 (8th Cir. 1995) (holding "[r]esidential privacy is a significant government interest."); *Carter*, 2005 WL 2253601, at *9 (holding the Indiana Telephone Privacy Act, which is designed to protect the residential privacy of individual telephone subscribers, "clearly passes the threshold test as advancing a significant governmental interest"); *State by Humphrey v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882, 888 (Minn. 1992) (finding state has a substantial interest in protecting privacy in the home).

Furthermore, that residential privacy is "significantly furthered" by the Act is beyond cavil. If the subscriber takes the appropriate affirmative action, the Act eliminates many intrusive, offensive, and unwanted telephone solicitations. Petitioners assert that no data in the record shows the Act actually reduces the number of intrusive telephone calls into private residences. Petitioners' argument, which was not made to the Eighth Circuit, ignores that the North Dakota Legislature could properly rely on factual findings of other

entities, such as the courts,[5] federal agencies, and other states,[6] as well as common sense.

By way of example, in 1991 Congress concluded "telemarketing calls to homes constituted an unwarranted intrusion upon privacy." *Moser*, 46 F.3d at 972. After receiving approximately 64,000 comments and holding a

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[5] *See* Pryor, 258 F.3d at 856 ("Our own experience suggests that most households in today's society are plagued by a flood of unwanted telephone solicitations."); *Van Bergen*, 59 F.3d at 1555 ("The sheer quantity of telemarketing calls further supports the government's interest in regulation protecting privacy. . . . Telemarketing calls . . . are flourishing, and becoming a recurring nuisance by virtue of their quantity."); *id.* at 1554 (the disruption caused by such calls is "evident to anyone who has received such unsolicited calls when busy with other activities."); *Humphrey*, 491 N.W.2d at 888 (explaining "the residential telephone is uniquely intrusive" and "for the elderly or disabled, the note of urgency sounded by the ring of the telephone signals a journey which may subject the subscriber to the risk of injury"); *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099, 1107 (N.J. Super. Ct. Law Div. 1995) (stating consumers are frustrated because there appears to be no way to prevent these calls).

[6] *See Carter*, 2005 WL 2253601, at *8, 13 (refers to legislative findings "that the inundation of calls by professional telemarketers, irrespective of any specific message, is intrusive and unwelcome in terms of residential privacy interests," and that professional telemarketers "are likely to resort to more aggressive tactics, make calls when residents least desire them, draw on their expertise in overcoming residents' attempts to terminate the calls, and make as many solicitation calls as possible in a given time-frame"); *id.* at *12 (stating "the undisputed evidence demonstrates that the [Indiana] Act's general prohibitions have already dramatically reduced the burden placed on residents from the inundation of unwanted telemarketing calls.").

three-day public forum, the FTC concluded that "consumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution." 68 Fed. Reg. 4580-01, 4637. *See also* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394§§ (finding "[m]any customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers"); *id.* (finding telemarketing to be "a risk to public safety" when "an emergency or medical assistance telephone line is seized.").

More recently, during the FTC's hearings leading up to the Proposed Rule, consumer commentators unanimously testified that they dislike the intrusiveness and inconvenience of telemarketing and that they wanted to be free of these calls. Telemarketing Sales Rule, Proposed Rule, 67 Fed. Reg. 4492-01, 4518 (Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310). The FTC also received studies showing that consumers rate telemarketing calls at the top of the scale of consumer nuisances. *Id.* at 4518 nn.246-47 (citing a study submitted by the National Consumer League showing 49% of respondents give telemarketing the highest rank of everyday experiences that bother them and a 1999 poll conducted by the State of Kentucky showing 80% of respondents found telemarketing calls to be annoying and intrusive).

2. The Act is narrowly tailored.

This Court has held the location to which a regulation applies is a significant factor to be considered not only in determining the strength of the government interest, but also in determining whether the regulation is reasonable and narrowly tailored. *See Hill*, 530 U.S. at 724, 728. The element of private choice is also a significant factor in this determination. The seminal case on this point is *Rowan*,

where this Court upheld an opt-in do-not-mail list system. Under the challenged statute, the Postmaster could issue an order directing the sender of offensive mail to refrain from further mailings upon request from the addressee. 397 U.S. at 730. As explained by the Court, "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." *Id.* at 737. The statute's element of private choice, coupled with the government's interest in protecting residential privacy, proved dispositive. "Congress," the Court explained, "has erected a wall--or more accurately permits a citizen to erect a wall--that no advertiser may penetrate without his acquiescence." *Id.* at 738. *See also National Fed'n of the Blind,* 420 F.3d at 342 (stating "[i]f consumers are constitutionally permitted to opt out of receiving mail which can be discarded or ignored, then surely they are permitted to opt out of receiving phone calls that are more likely to disturb their peace"); *Mainstream Mktg.*, 358 F.3d at 1242 (stating "[t]he Supreme Court has repeatedly held that speech restrictions based on private choice (i.e.,--an opt-in feature) are less restrictive than laws that prohibit such speech directly."); *Bland,* 88 F.3d at 733 (upholding prohibition of automatic-dialing and announcing devices except with householder consent, explaining the statute made "no decisions for the called parties who remain free to decide for themselves whether or not to listen to prerecorded messages"); *Carter*, 2005 WL 2253601, at *10.

Based upon this precedent, the Eighth Circuit properly found the Act, which applies to residential subscribers only and permits individual subscribers to decide whether to prohibit calls, is narrowly tailored. Due to the opt-in nature of the Act, the Act eliminates only those phone calls that citizens themselves expressly do not want to receive. Individual subscribers, not the government, decide whether

and which calls are unwanted and disrupt residential privacy. The Act implements each subscriber's decision, and leaves room for the subscriber to modify what calls are banned so only unwanted calls are eliminated. If registered subscribers wish to receive any calls defined as a "telephone solicitation," they can give their consent or permission for a caller to make the telephone solicitation. *See* N.D. Cent. Code § 51-28-01(7)(a), Pet. App. 28a. Thus, the Act is the embodiment of counsel given in *Martin v. City of Struthers*, 319 U.S. 141 (1943), where this Court indicated that a statute that makes it an offense to "ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed" is acceptable because the statute "leaves the decision . . . where it belongs--with the homeowner." *Id.* at 148. The Act permits telephone subscribers to "appropriately indicate" they are "unwilling to be disturbed." Subscribers have the right to do so. *Rowan*, 397 U.S. at 737 ("The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property.").

3. The Act leaves open ample alternatives for communication.

The Eighth Circuit's conclusion the Act leaves open ample alternative channels of communication is also in accord with this Court's precedent. The lower court noted the Act only "prohibits calls to the homes of residents who have chosen not to receive calls from professional charitable solicitors." Pet. App. 8a. Unless consumers take the affirmative act of registering their residential telephone number, charities remain free to use the telephone to contact North Dakota consumers. And even if that affirmative action is taken, employees or volunteers of charities may still solicit funds. Pet. App. 8a. Further, charities and non-charities are free to communicate their message to residents in person (door-to-

door, on the street corner, from booths, *etc.*), by mail, through newspapers, magazines, leaflets, the yellow pages, billboards, posters and signs, and over the radio, television and Internet. Pet. App. 8a.

Petitioners' assertion that *Riley*, 487 U.S. 781, *Secretary of State of Md. v. Joseph H. Munson, Co.*, 467 U.S. 947 (1984), and *Schaumburg*, 444 U.S. 620, demand a different outcome are misplaced. As explained by the Fourth Circuit, those "cases are, quite frankly, horses of a different color." *National Fed'n of the Blind*, 420 F.3d at 343. Judge Wilkinson's explanation as to why that trilogy of cases does not dictate a different result is equally persuasive in this case. *Id.* at 343-45. "Those three cases, as the Supreme Court has subsequently explained, considered 'prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level.'" *Id.* at 343 (quoting *Illinois, ex rel Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003)). The Act, on the other hand, places no limitation on the amount of a telemarketer's fee, and is designed to protect residential privacy through content neutral place and manner restrictions.

The lower court's analysis is consistent with, and appropriately applies, the time, place, and manner precedent of this Court.

C. Petitioners' other arguments are not properly before the Court.

In an attempt to justify their demand for this Court's attention, Petitioners go beyond the scope of the arguments they made below, as well as the decision of the Eighth Circuit. Those arguments are not properly before the Court.

See Clingman, 125 S. Ct. at 2041-42; *Cooper Indus.*, 543 U.S. at 168-69.

1. The Act does not impermissibly mandate speech.

Although touched upon at page 17 of the Petition, the Eighth Circuit did not address, and Petitioners did not raise to the Eighth Circuit, whether the Act impermissibly mandates speech. Because this issue was not raised below or addressed by the Eighth Circuit, review is not warranted.[7]

In any event, *Riley* does not support Petitioners' position. N.D. Cent. Code 51-28-01(7)(c)(2), Pet. App. 28a, requires the caller disclose the caller's first and last name and the name, address, and telephone number of the organization. In *Riley*, however, the plaintiff did not challenge, and the Court did not address, a requirement that the caller disclose his or her name and the name of the organization. 487 U.S. at 786.

Also, under the *Riley* analysis, compelling disclosure of the caller's name and the name, address, and telephone number of the organization is constitutional. Such a disclosure would not "substantially burden" any protected speech. *Id.* at 798. In fact, accurately identifying the organization for which the call is being made can do nothing but help further the organization's mission. But even if the required disclosure did minimally burden speech, such burden is remote or incidental and does not raise First Amendment concerns. *Id.* at 799 n.11 (stating "nothing in this opinion should be taken to suggest that the State may not require a

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[7] Although this issue was raised at the district court, the district court also did not address it.

fundraiser to disclose unambiguously his or her professional status"); *see also Indiana Voluntary Firemen's Ass'n v. Pearson,* 700 F. Supp. 421, 442 (S.D. Ind. 1988).

Thus, even if the Eighth Circuit did address this issue, which it did not, a holding in favor of Respondent would not be inconsistent with *Riley*.

2. Maintenance of the registry is not properly before the Court.

The decision below also did not address Petitioners' assertion the Act lacks appropriate mechanisms to ensure telephone numbers on the list are accurate, or a procedure to remove telephone numbers from the list. Pet. 8. Equally fatal to review is the fact this concern challenges the implementation of the Act, which is not an appropriate argument in a facial challenge. *See Frisby*, 487 U.S. at 488; *Carter*, 2005 WL 2253601, at *10 n.13.

Moreover, the Act does take steps to ensure old numbers are removed from the lists. N.D. Cent. Code § 51-28-09(1)(b), Pet. App. 32a, provides that "notice given by a subscriber . . . is effective for five years unless revoked by the subscriber." Thus, a subscriber can remove the subscriber's number from the list, and a subscriber must periodically renew the subscriber's request to remain on the do-not-call list. Furthermore, the Attorney General has authority to "adopt rules governing the establishment, distribution, and operation of the do-not-call list." N.D. Cent. Code § 51-28-09(1), Pet. App. 31a. If, as the statute is implemented, concerns exist regarding individuals without authority placing numbers on the list or numbers not being

renewed on the list, the Attorney General can adopt rules addressing those issues.[8]

There is no reason, in the context of a facial challenge, to assume the Attorney General will allow invalid phone numbers to accumulate on the list. And even if a few unauthorized numbers are on the list, that would not provide a basis for invalidating the entire law. It would not represent the sort of "substantial overbreadth" necessary for facial invalidation. *See New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988) (explaining that a "facial challenge will not succeed unless the statute is 'substantially' overbroad") (citation omitted); *New York v. Ferber*, 458 U.S. 747, 771 (1982) ("The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel."); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (stating "the overbreadth of a statute must not only be real, but substantial as well").

3. The Act does not favor commercial speech.

Also not properly before the Court is Petitioners' assertion the Act treats some commercial speech more favorably than charitable speech. Pet. 24. The lower court did not address this issue. Furthermore, Petitioners' assertion N.D. Cent. Code N.D.C.C. § 51-28-01(7)(b), the established business relationship exception, treats commercial speech more favorably than charitable speech is an "as applied" challenge, not appropriate in this facial challenge. Respondent has not

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[8] Indiana has promulgated regulations providing comprehensive procedures to compile and to maintain an accurate telephone-privacy list. *See* Ind. Admin. Code tit. 11, r. 2-2, *et seq.*

applied the established business relationship as interpreted by Petitioners.[9] If an actual case or controversy does ever arise regarding application of the established business relationship exception, North Dakota courts will resolve that case or controversy.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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[9] Based upon North Dakota statutory law, Respondent interprets N.D. Cent. Code § 51-28-01(7)(b) to apply to charities and commercial entities alike. *See* N.D. Cent. Code § 51-15-01(3), (5).

(3)

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IN THE

Supreme Court of the United States

FRATERNAL ORDER OF POLICE, NORTH DAKOTA STATE LODGE; VETERANS OF FOREIGN WARS, DEPARTMENT OF NORTH DAKOTA,
Petitioners,

v.

WAYNE STENEHJEM, in his official capacity as Attorney General of the State of North Dakota,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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STATUTES

North Dakota Cent. Code Chapter 51-28-01 *et seq.* 1

Pursuant to Supreme Court Rule 15, Petitioners Fraternal Order of Police, North Dakota State Lodge; Veterans of Foreign Wars, Department of North Dakota ("Petitioners") respectfully submit this Reply Brief in Support of the Petition for a Writ of Certiorari (the "Petition") and (A) request that the Court consider the Petition concurrently with the "Petition for a Writ of Certiorari" filed in the matter entitled *National Federation of the Blind v. Federal Trade Commission*, 420 F.3d 331 (2005), Case No. 05-927; and (B) address matters newly raised in the "Brief in Opposition" (the "Opposition") filed on behalf of Wayne Stenehjem, in his official capacity as Attorney General of the State of North Dakota ("Respondent").

ARGUMENT

A. The Court Should Consider this Petition Concurrently with the Petition for a Writ of Certiorari Regarding *National Federation of the Blind.*

This case and *National Federation of the Blind* present similar questions regarding the constitutionality of *charitable speech restrictions that apply to charities using professional fundraisers, but do not apply to charities using staff or volunteer fundraisers*. Petitioners request that the Petitions be considered together, and that review be granted in both cases.

In this case, the Eighth Circuit has upheld North Dakota Cent. Code Chapter 51-28-01 et seq. (the "Act") extending the national do-not-call registry (the "National Registry") to charities using professional fundraisers in North Dakota.[1]

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[1] While this challenge is a "facial challenge," it is important to consider that the Act effectively bans telephone solicitations by charities that are unable to afford in-house fundraisers. Charities that cannot afford their own fundraising staff certainly cannot afford to purchase the equipment or pay the fees necessary to maintain the National Registry. Even now, the FTC is seeking to increase the fees for the National Registry. *See* www.

The Act does not apply the National Registry to charities using staff or volunteer fundraisers.

The National Registry is maintained by the Federal Trade Commission (the "FTC") and the Federal Communications Commission (the "FCC"). The FTC and FCC do not impose the National Registry on *any* charitable calls, including calls made by professional fundraisers. The FTC imposes other burdens selectively on charities using professional fundraisers, however, including an entity specific do-not-call provision (requiring the charities to maintain a record of all persons called who request not to be called again), calling time restrictions, a requirement that telefunders transmit caller-ID information and promptly identify the call as a solicitation, and a prohibition on abandoned calls. These restrictions were upheld by the Fourth Circuit in *National Federation of the Blind*.

Both this decision and the decision in *National Federation of the Blind* impose expensive—prohibitively expensive—burdens on the speech of charities that already are so poor that they cannot afford to hire their own fundraising staff, and are forced to turn to professional fundraisers. On their face, these burdens are unconstitutional under the First and Fourteenth Amendments.

B. Petitioners Contend the Act is Unconstitutional; Not Preempted.

In the Opposition, Respondent concedes that: ". . . neither the FCC nor the FTC prohibits telemarketing calls on behalf of charities to all federally-registered telephone subscribers" and "North Dakota does not maintain a separate state registry; it merely enforces its substantive no-call law for the benefit of North Dakota residents *who have registered for the federal*

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ftc.gov/os/2006/04/P034305TSRFeesNPRandRequestforPublicCommentFRNotice.pdf.

list. . . ." (Opposition, p. 7-8.) These concessions prove Petitioners' point—that North Dakota is selectively extending the National Registry to charitable speech by charities employing professional fundraisers.

Respondent seeks to deflect this challenge by mischaracterizing Petitioners' argument as a preemption argument, and arguing that the substantive regulations of the FTC and FCC cannot *preempt* North Dakota's ability to regulate telephone solicitations. (Opposition, p. 5-7.) However, Petitioners are not arguing preemption or seeking to preclude North Dakota from regulating telephone solicitations. Instead, Petitioners contend that North Dakota is attempting to do what the FTC, FCC, and Tenth and Fourth Circuits have suggested cannot be done within the bounds of the United States Constitution.

As noted in the Petition, the FTC and FCC exempt charitable calls from the National Registry in recognition of the potential constitutional violations that would result from its application. The Tenth and Fourth Circuit Courts of Appeal have sanctioned this exemption. *See Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004) cert. denied, 543 U.S. 812 (2004) (upholding the application of the national do-not-call restrictions to commercial speech only, and noting the exemption of charitable calls); and *National Federation of the Blind*, 420 F.3d 331 (upholding the application of company-specific call restrictions to charitable solicitation by professional fundraisers). Thus, Petitioners do not argue that the Act is preempted, but that it is unconstitutional, and cite in support the agencies that are charged with applying the National Registry and the Courts of Appeal that have reviewed their decisions.

In the Opposition, Respondent attempts to refute Petitioner's constitutional argument by claiming that the extension is content-neutral, narrowly tailored and justified by the privacy invasions caused by *commercial* telemarketing. Respondent's arguments lack merit.

1. The Act is Content-Based; Not Content Neutral.

In the Opposition, Respondent argues that the Act is content-neutral because it targets calls by charities employing professional fundraisers based on the Legislature's judgment that these charities are able to generate a greater "sheer volume" of calls than charities using staff and volunteer fundraisers. Opposition, p. 13.

The First Amendment is intended to protect and promote speech. *See* U.S. Constitution, First Amendment ("Congress shall make no law . . . abridging the freedom of speech. . . .") Under the First Amendment, "more speech" is not an evil to be remedied; it is a constitutional value to be protected. The Act is not an attempt to regulate speech to serve a legitimate governmental interest; it is simply an attempt to lessen the "sheer volume" of speech by banning it.

Further, Respondent's argument that charities using professional fundraisers generate more calls is speculative and without any evidentiary support. If charities using professional fundraisers were so successful, they would quickly generate the funds necessary to hire fundraising staff in order to avoid the high fees charged by professional fundraisers. Like the FTC's assertion in *National Federation of the Blind* that professional fundraisers are more likely to engage in "more abusive and coercive telemarketing" than staff or a volunteer, Respondent's argument fails for want of factual support. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 414 (1993) (holding that it is the government's burden to establish a reasonable fit between its legitimate interests and regulation of speech); and *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (holding that "anecdotal evidence" failed to satisfy the government's burden in regulating speech).

Speech regulation is content-based if it requires the government to review the content of speech in order to apply the regulation. In *Rowan v. United States Post Office*, 397 U.S.

728 (1970), for example, the Court upheld a statute allowing a resident to instruct the Post Master General to stop unwanted mailings. The Court construed the statute as vesting discretion over the characterization of the subject mailings with the resident, instead of the Postmaster General, in order "to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a government official." *Id.* at 744. The Court noted that the statute could not vest power in a government official to determine "whether the materials were 'similar' or 'possessing touting or pandering characteristics" because that would engage the government in "an evaluation suspiciously like censorship." *Id.* at 735.

The Act is content-based because it requires the government to review of the content of a charitable solicitation in order to determine whether the Act has been violated—contrary to *Rowan.* "The Act defines 'telephone solicitation' as 'any voice communication over a telephone line for the purpose of *encouraging charitable contributions. . . .*'" Opposition, p. 1. This definition *requires* the government to review the content of a solicitation to determine whether it is made to "encourage charitable contributions," as opposed to being made to "educate" the recipient of the call about the charity's activities.

The content-based nature of the Act is exacerbated because it grants the government discretion to determine that a call violates the Act even if it does not *explicitly* encourage solicitation. Calls violate the Act if they are made "*for the purpose*" of encouraging charitable contributions, even if they do not expressly request a donation. There are no guidelines or limitations on how the government is to determine the charity's subjective intent in making the call, however. Therefore, the Act is unconstitutional for the additional reason that it confers discretionary authority in the government. *See Cantwell v. State of Connecticut,* 310 U.S. 296, 307 (1940) (holding that "to condition the solicitation of aid for

the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.").

Based upon the foregoing, and contrary to Respondent's arguments in Opposition, the Act is content-based.

2. The Act is Not "Narrowly Tailored."

In the Opposition, Respondent argues that the courts below properly found that the Act is "narrowly tailored" and therefore constitutional, in that:

> "The lower court noted the Act only 'prohibits calls to the homes of residents ***who have chosen*** not to receive calls from professional charitable solicitors." (Opposition, p. 20, emphasis added.)
>
> ". . . the Eighth Circuit properly found the Act, which applies to residential subscribers only and permits individual subscribers ***to decide*** whether to prohibit calls, is narrowly tailored. Due to the ***opt-in nature of the Act***, the Act eliminates only those phone calls that citizens themselves ***expressly do not want to receive***. Individual subscribers, not the government, ***decide*** whether and which calls are unwanted and disrupt residential privacy. The Act implements each subscriber's ***decision***, and leaves room for the subscriber to modify what calls are banned so only unwanted calls are eliminated." (*Id.*, pp. 19-20, emphasis added.)

In support of this argument, Respondent cites to *Rowan*, 397 U.S. 728, and argues that the Act permits the resident to decide whether to stop charitable solicitations by signing up on the National Registry.[2] However, in *Rowan*, the residents

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[2] *Rowan* is inapplicable to this case, because it (a) involved purely commercial speech; whereas this case involves charitable speech; (b) upheld an "opt-in" that enabled a resident to prohibit *an identified com-*

knew what they were signing up for. North Dakota residents signing up for the National Registry do ***not*** knowingly "choose" or "decide on" its application to charities at all, much less its limited application to solicitations by charities using professional fundraisers. The FTC and FCC do not apply the National Registry to *any* charitable calls. Individuals signing up for the National Registry are expressly told that the National Registry ***does not apply to charitable speech***.[3] Consequently, North Dakota residents signing up for the National Registry cannot be said to have "*chosen*" or "*decided*" not to receive calls from charities using professional fundraisers. In fact, the Act prevents residents who welcome charitable calls from receiving charitable calls from poorer charities using professional fundraisers, if they have signed up with the National Registry to avoid commercial telemarketers. It is the State—not the individual resident—that has decided to stop charitable calls through the National Registry.

In support of its narrowly tailored argument, Respondent also cites to *National Federation of the Blind* (upholding the

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mercial mailer from continuing to send mail solicitations to him, similar to the FTC's company-specific do-not-call prohibition; whereas this case involves a blanket prohibition on any calls by professional fundraisers; and (c) the statute in *Rowen* had been amended to ensure that the government did not participate in any content review; whereas the Act requires content review by the government to determine whether the solicitation is made "for the purpose of encouraging" charitable contributions.

[3] In fact, the FTC's current web-site (www.donotcall.gov) expressly represents that the national do-not-call registry does *not* apply to charitable calls. It states, in part: "30. Are calls from political organizations *or calls soliciting for charities* covered? . . . *Charities are not covered by the requirements of the national registry*. However, if a third-party telemarketer is calling on behalf of a charity, a consumer may ask not to receive any more calls from, or on behalf of, that specific charity. If a third-party telemarketer calls again on behalf of that charity, the telemarketer may be subject to a fine of up to $11,000." (Emphasis added.)

FTC's company-specific do-not-call list on the ground that the company-specific approach is "narrowly tailored" compared to the National Registry); *Mainstream Marketing* (upholding the application of the National Registry to *core commercial* speech), and *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996) (upholding a prohibition on the use of automatic-dialing and announcing devices). These authorities similarly fail to support Respondent's "opt-in" argument because, again, there is no evidence that North Dakota residents knowingly "opt-in" to the application of the National Registry to charitable solicitation by charities using professional fundraisers.

3. The Regulation of the Speech of Charities Using Professional Fundraisers Cannot be Justified by Privacy Intrusions Caused by Commercial Telemarketing.

Respondent's agrument boils down to one simple proposition: Any ban on any type of telephone solicitation is good, hence constitutional, because it furthers the government's interest in protecting the privacy of the home. The Eight Circuit adopted this "big picture" definition of the problem, stating: "In the case before us, the overall problem is the intrusion on residential privacy caused by unwanted telephone solicitation." *See Fraternal Order of Police v. Stenehjem*, 431 F.3d 591, 598 (8th Cir. 2005); Pet. Appx., p. 6a, emphasis added. The Eight Circuit relied upon the North Dakota Legislature's "judgment" that less speech is better, stating: "In this facial challenge, we are reluctant to second-guess the North Dakota Legislature's *judgment* that professional charitable solicitors intrude more regularly on residents' privacy than volunteers or employees and that the Act is a necessary means of enabling its citizens to halt these intrusions." *Id.*, 431 F.3d at 598; Pet Appx., p. 5a, emphasis added.

In the Opposition, Respondent claims that the North Dakota Legislature's "judgment" that the National Registry

should be selectively applied to charities using professional fundraisers was based on "factual findings of other entities" regarding privacy intrusions caused by ***commercial telemarketing***. *See* Opposition, p. 17, n. 5, citing *National Federation of the Blind v. Pryor*, 258 F.3d 851, 856 (2001) (referring broadly to "unwanted telephone solicitations" of all types, including commercial solicitations); *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) (referring to the use of automatic telephone dialing-announcing devices for all types of calls, including commercial and political calls); *State by Humphrey v. Casino Mktg. Group, Inc.*, 492 N.W.2d 882, 888 (Minn. 1992) (referring to commercial solicitations by automatic dialing—announcing devices); and *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099 (N.J.Super.Ct. Law. Div. 1995) (referring to commercial speech).

While it is not clear whether the North Dakota Legislature actually considered these authorities as justifying the extension of the National Registry to charitable speech, if it did, there is even more reason to find the Act unconstitutional. If it relied on these authorities, the North Dakota Legislature lacked evidence that (a) charities using professional fundraisers made any invasive calls to North Dakota residents; (b) there was a "sheer volume" of such calls; and (c) residents considered such calls to be more intrusive than calls by charities using fundraising staff or volunteers. Under the First and Fourteenth Amendments, a selective ban on the speech of charities cannot be justified by privacy intrusions caused by commercial telemarketing.

C. Respondent Fails to Address the Act's Violation of Equal Protection.

The Fourteenth Amendment provides: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Act violates the equal protection clause of the Fourteenth Amendment by discriminating among similarly situ-

ated charitable speakers delivering comparable solicitations. *See* Petition for Writ of Certiorari, p. 23, n. 7. Respondent's argument that its regulation is justified by the North Dakota Legislature's judgment that professional fundraisers can deliver a greater volume of calls is tantamount to an admission of an equal protection violation—not a permissible justification for one.

CONCLUSION

Based upon the foregoing, Petitioners respectfully request that the Court consider the Petition in this action concurrently with the Petition for a Writ of Certiorari in the *National Federation of the Blind*, Case No. 05-927 and grant both Petitions.

Respectfully submitted,

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